

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF ALABAMA  
3 SOUTHERN DIVISION

4 IN RE: BLUE CROSS BLUE SHIELD CASE NO.: 2:13-cv-20000-RDP  
5 ANTITRUST LITIGATION MDL 2406

6 VOLUME II

7 \* \* \* \* \*

8 MOTION HEARING

9 FOR FINAL APPROVAL OF CLASS SETTLEMENT

10 OF SUBSCRIBER PLAINTIFFS' CLAIMS

11 \* \* \* \* \*

12 BEFORE THE HONORABLE R. DAVID PROCTOR, UNITED STATES  
13 DISTRICT JUDGE, at Birmingham, Alabama, on Thursday, October 21,  
14 2021, commencing at 9:07 a.m.

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16 Proceedings reported stenographically;  
 17 transcript produced by computer.

18 \* \* \* \* \*

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1 (The following proceedings were heard before the Honorable  
2 R. David Proctor, United States District Judge, at  
3 Birmingham, Alabama, on Thursday, October 21, 2021,  
4 commencing at 9:07 a.m.:)

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6

7

8 THE CLERK: Come to order, please.

9 THE COURT: All right. Good morning, everyone. Have a  
10 seat.

11 COUNSEL IN UNISON: Good morning, Your Honor.

12 THE COURT: So we have -- let me ask this. I did get  
13 from the special master a proposed agenda for today. I  
14 wonder who all participated in that. Was it the objectors as  
15 well, or was this just the proponents of the settlement?

16 SPECIAL MASTER GENTLE: Just the proponents, Your  
17 Honor.

18 THE COURT: Okay. That's what I thought.

19 MR. RICHIE: I haven't seen it, Your Honor.

20 THE COURT: All right. So do we have a hard copy that  
21 we can provide to the objectors since this would affect their  
22 time limits as well? And I do want to just -- I do want to  
23 address a few things on it, but I thought that's the first step  
24 is just making sure everybody understands the baseline we're  
25 starting from as a proposal, not an absolute.

1 MR. BURNS: Your Honor, would you like me to put it on  
2 the Elmo?

3 THE COURT: Yes. That might be good. We can put it on  
4 the Elmo for everyone who -- that's why you get paid the big  
5 bucks, Warren. You figure stuff like that out.

6 MR. BURNS: There you go.

7 THE COURT: Okay. So it seems to me I do want to hear  
8 about second Blue bids. We never got to that yesterday. What  
9 was the deal? How did the line get drawn? What's the  
10 rationale? I do need to hear about that.

11 I do think it's fine for counsel to address ESAs as  
12 we -- before we leave that -- before we get started with the  
13 witnesses this morning.

14 You know, I'll be honest with you. As far as argument  
15 today, unless it's just kind of introduction to make sure I  
16 understand what a witness is going to tell me on these issues  
17 this morning, you're going to have a full opportunity to present  
18 written argument, because I'm not ruling from the bench on this.  
19 You can imagine. I'm not even taking this under submission  
20 because I may give y'all some homework to provide me. I might  
21 give it today and I might give it after today through the  
22 special master. This is too important a matter just to worry  
23 about how quickly I'm getting a ruling out. I do expect I'll  
24 have a ruling out as soon as possible.

25 But as far as the class members that want to still be

1 heard, my understanding is Mr. Shattuck no longer wishes to  
2 speak. I understand Mr. Cochran has provided us a transcript of  
3 what he's going to say. So if there's anything he wants to add  
4 to that, I'm going to give him that opportunity.

5 And, Mr. Behenna, I'm going to ask you just to address  
6 one thing, and that is why isn't this a common fund settlement.  
7 If this creates a common fund, I'm not sure that fee-shifting --  
8 the fact that it's a fee-shifting statute makes a difference,  
9 but I want you to address that argument in particular. I think  
10 I have the rest of your argument based upon what you presented  
11 yesterday. All right?

12 I don't know that we need to spend three and a half  
13 hours on -- are the Bradley objectors mainly going to be dealing  
14 with the allocation?

15 MR. RICHIE: Well, yes, Your Honor. There are a couple  
16 of issues there. And there are some additional issues that may  
17 arise from Dr. Mason's testimony.

18 (The court reporter interrupts for clarification)

19 THE COURT: There may be some additional issues that  
20 arise from Dr. Mason's testimony?

21 MR. RICHIE: Yes, Your Honor.

22 THE COURT: Well, we'll use this as the order of  
23 operation as far as time limits. I may move you along. Just  
24 don't get offended if I do it. Okay.

25 MR. RICHIE: Your Honor, this is the first time I'm

1 seeing this document. I do not anticipate argument lasting for  
2 two hours on our presentation.

3 THE COURT: Well, that's the best news I've had all  
4 day. You must have clerked for a pretty doggone good judge.

5 All right. Now, we left off -- are the ESAs -- are we  
6 going to deal with the whole issue of divisible versus  
7 indivisible relief on the second Blue bid? Is that what's going  
8 to take place in the first ten minutes, a report on that, or  
9 something else?

10 MR. BOIES: I think, Your Honor, what we contemplated  
11 in the first ten minutes was simply to try to respond to the  
12 statements that were made yesterday at the end, leaving aside  
13 the attorneys' fees issue.

14 (The court reporter interrupts for clarification)

15 THE COURT: You're going to have to get close to that  
16 microphone.

17 MR. BOIES: Excuse me, Your Honor.

18 What we thought for the first ten minutes, we were  
19 simply going to respond to the issues raised at the end of the  
20 day yesterday, not the attorneys' fees issues but the  
21 information that was presented to the Court about what the right  
22 standard was in terms of clearly illegal, whether the ESAs would  
23 be per se unlawful going forward. Those issues.

24 THE COURT: Well, then why don't you start right there.

25 MR. BOIES: Okay. I think that the defendants are



1 going to go and then I'm going to go. Thank you.

2 MR. ZOTT: Thank you, Your Honor.

3 So briefly, Your Honor, I just wanted to respond to  
4 some of the arguments you heard yesterday. The first is the  
5 future release argument. And there the law is very clear, Your  
6 Honor, that the parties can release future claims when the  
7 claims are based on the continuation of prerelease conduct. And  
8 that's very typical in antitrust cases like this case where you  
9 have a set of practices that are challenged.

10 THE COURT: Isn't that exactly what sort of happened in  
11 this case early on with a bunch of the providers who wanted to  
12 come in and weren't even signatories to the settlement in *In Re*  
13 *Managed Care*?

14 MR. ZOTT: I think that's right. I think that's right.  
15 And --

16 THE COURT: The large settlement agreements?

17 MR. ZOTT: And that's true of, like, the cases like  
18 *Grunin* and *Robertson* where the plaintiff challenged a whole set  
19 of practices either of the NBA or the NFL. Some practices were  
20 changed through the settlement, but some continued. And the  
21 court said that's fine and you can release those claims  
22 regarding the continuing conduct because it was something that  
23 had been raised and litigated and come to a settlement. And  
24 there's a lot of cases that support that point.

25 The *Redel's* case that Home Depot cited, you may recall,

1 with the little flip chart there, that case is completely  
2 different. I mean, that is a case where the court found that  
3 the release was overbroad. And while Home Depot's counsel told  
4 you that that release was part of a settlement -- you may recall  
5 that from the way he wrote the chart -- there was no settlement  
6 in that case at all. Now, that was GE. Every time they entered  
7 into a franchise agreement, they included a general release so  
8 the franchisees had to release every claim they could possibly  
9 bring. And when they were later sued in an antitrust violation,  
10 the court said, well, you know, you can't do that, there wasn't  
11 any prior litigation, it wasn't tethered to any prior conduct,  
12 so it's a completely different case. And later cases have  
13 distinguished it on that basis.

14           That's not what we're doing here. We have a release  
15 that's tied specifically to the factual predicate of the  
16 lawsuits or to issues raised in the litigation. That's  
17 perfectly appropriate under the law and under these various  
18 cases, particularly in this context.

19           Second, on the whole clearly illegal, you know, what  
20 Your Honor has to determine on service areas, I think the  
21 subscribers, the defendants, and the Slater objectors recognize  
22 and agree that the Court has to determine whether or not service  
23 areas as well as the system going forward -- whether it will be  
24 per se or clearly illegal or, if not, then it would be subject  
25 to the rule of reason. The only --

1 THE COURT: Wouldn't I just do this to be on the safe  
2 side? How about we just all agree I'm going to evaluate it as  
3 to whether it's clearly illegal and whether it would be a per se  
4 violation going forward and say it doesn't matter, then, which  
5 test it is. If they -- it seems to me they're either -- this is  
6 going to either sink under both tests or stay above the surface  
7 on both tests.

8 MR. ZOTT: I agree.

9 THE COURT: I don't know that there's -- even if -- I  
10 think you're arguing there's not a material distinction. Well,  
11 then what are the odds of this arrangement being so unique that  
12 it actually slides between whatever crack there is between those  
13 two tests?

14 MR. ZOTT: I agree. That would be the safest way to do  
15 it. And the only point I was going to make is, you know, they  
16 rely on *Bennett*, and they rely on one sentence from *Bennett*.  
17 And Your Honor pointed out yesterday -- I think it was your law  
18 professor that said don't pick specific sentences, you have to  
19 look at the context overall.

20 *Bennett* is citing back to *Grunin*. And if you take a  
21 look at *Grunin*, there is that language about legal certainty.  
22 But in the very next breath, the very next sentence, *Grunin* says  
23 because the conduct is not per se unlawful, we're going to  
24 approve it. And earlier in the opinion, in the prior paragraph,  
25 the court says we look to see whether it's per se; if it's not,

1 we subject it to a rule of reasonableness. So you need to look  
2 at the whole context and --

3 THE COURT: I think I've got that.

4 MR. ZOTT: Yeah. Okay. You've got that.

5 And then the last point, just on distinguishing *Topco*,  
6 I raised two fundamental issues. First, Your Honor, I said that  
7 unlike *Topco*, here we have ongoing cooperative conduct where  
8 we've integrated our offerings to create a product that no  
9 individual plan could offer. And that's not *Topco*. That didn't  
10 happen in *Topco*.

11 THE COURT: Right.

12 MR. ZOTT: Second, I said we have a unique history here  
13 that's unlike anything in the law or in history, including the  
14 rule of common-law trademarks. In response to that -- they  
15 didn't address my first argument at all about integration. In  
16 response to the second argument about common-law trademark, they  
17 referred back to *American Needle*. And they tried to then get  
18 into the whole single-entity discussion.

19 THE COURT: Well, they also point out that *Topco* was  
20 trademarks -- was dealing with trademarks or at least branded  
21 products.

22 MR. ZOTT: Right. But *Topco* did not deal -- I mean, it  
23 dealt with branded products, but it did not deal with common-law  
24 trademarks, the preexisting common-law trademarks that were  
25 developed independently and that conferred exclusivity prior to

1 any agreement among the parties. That's what we have here.

2 That was not *Topco*. But my point is --

3 THE COURT: Well, and the fact of the matter is the  
4 Eleventh Circuit never addressed your argument there. I did  
5 look at Mr. Clement's brief where that was -- those -- it seemed  
6 to me those were the two arguments made. And actually, the  
7 common-law trademark issue led with that.

8 MR. ZOTT: Right.

9 THE COURT: So that's what I've got to sort through is,  
10 okay, well, now, in light of the tweaks to the system and now  
11 that I'm being asked to focus on ESAs in particular, I've got to  
12 go back and address -- I've never addressed that argument.

13 MR. ZOTT: Agreed. Understood.

14 And lastly, I would just say *American Needle*, you know,  
15 is a different case because that dealt with the issue of whether  
16 the conduct is within Section 1 at all, is it concerted action  
17 at all. And that's the whole single-entity discussion. The  
18 part of *American Needle* that they don't mention, though, is  
19 after the Court found --

20 THE COURT: I've got *American Needle* figured out, I  
21 think.

22 MR. ZOTT: Okay. You got it.

23 THE COURT: Now, I could be -- look, the circuit, if  
24 this gets appealed, may tell me I'm dead wrong.

25 MR. ZOTT: You got it, Judge.

1 THE COURT: But the way I'm analyzing *American Needle*  
2 is this. If there was a mistake made by anybody, it wasn't the  
3 parties in settling with the *American Needle* thread hanging over  
4 their head. It was my mistake in saying that *American Needle*  
5 could not be decided -- the *American Needle* issue could not be  
6 decided on the facts before me in the Rule 56 record.

7 MR. ZOTT: Agreed, Your Honor.

8 THE COURT: And so that is a risk for both sides going  
9 forward. Now, there may be some second-guessing on how you  
10 assess that risk or how the class has assessed that risk, but it  
11 is a risk. And that's one of the things, I think, that  
12 Mr. Isaacson talked about yesterday is if we want -- you know,  
13 and this is a heavy factor for me, to be honest with everybody.  
14 If we want uncertainty and speculative -- speculation about what  
15 might happen down the road, let's just keep litigating.

16 MR. ZOTT: I agree. I agree with that. And that's a  
17 main motivator for why we're here today.

18 The only final point I'd make is once you get through  
19 all that discussion on *American Needle*, it applied the rule of  
20 reason. The Court said it's concerted, but it's under the rule  
21 of reason.

22 So thank you, Your Honor. That's it on those issues.

23 THE COURT: Yes. That's one of the things you pointed  
24 out to me many times early in this case when we were talking  
25 about per se.

1 MR. ZOTT: I'm nothing if not repetitive, Your Honor.

2 MR. BOIES: Your Honor, I can be very brief. We agree  
3 that the standard is whether the conduct that was going to  
4 continue is or is not clearly or per se illegal. You have to  
5 make that finding that it's not, but you don't have to go any  
6 further than that.

7 With respect to whether the conduct going forward is  
8 clearly illegal, even before we made the changes, we had 70, 75  
9 years where nobody challenged this. I think it's hard to say  
10 that it's clearly illegal under those circumstances.

11 I won't talk about the single enterprise. I think the  
12 Court has that completely right.

13 I think that because the standard is whether something  
14 is clearly illegal or not, even though this Court is, as we've  
15 argued to the Court, armed by Supreme Court precedent in terms  
16 of an assessment as to whether it's clearly illegal or not, you  
17 do have to take into account whether *Topco* continues to be good  
18 law. Even if it is continuing to be good law, I agree to some  
19 extent with defendants' counsel that you have to look at  
20 questions like integration, questions like the difference  
21 between products and services, to determine whether or not it's  
22 clearly applicable or not. We have argued and I would argue  
23 again that it is applicable, but I would say to the Court I  
24 could not say that it's clearly beyond any legal certainty  
25 applicable. And I think that's the right standard.

1 THE COURT: To make no mistake about it, if this case  
2 were to continue, you'd continue to make that assertion. But  
3 what you're saying for purposes of resolving the case is that  
4 that is not a legal certainty.

5 MR. BOIES: Right. And as I said to the Court in one  
6 of the economic days, while I did think that the prohibition on  
7 green competition was clearly illegal, the issue with the  
8 trademarks is more complicated. I've said that to the Court  
9 from the beginning.

10 THE COURT: Let me ask you this. Has anybody gone back  
11 to look at *Delta Dental*? And does anybody have a position on  
12 how -- I realize it's not binding, but what do you make of Judge  
13 Bucklo's analysis and how it might apply here, if at all?

14 MR. BOIES: I personally agree with that analysis, but  
15 that's maybe in part because we have some involvement in that  
16 case. But I would note to the Court that the stage of that  
17 decision is one that --

18 THE COURT: You're standing on Mr. Zott's distinction  
19 too in terms of you're not able to ride that case in this  
20 situation because it was on a motion to dismiss.

21 MR. BOIES: Exactly, Your Honor.

22 THE COURT: But you're absolutely advocating that she  
23 got it right on that?

24 MR. BOIES: We do advocate that, Your Honor.

25 THE COURT: Okay. I'm just kidding. All right. Fair



1 enough.

2 All right. Anything else on ESAs?

3 All right. Let's just real quickly -- before we start  
4 on the evidence and the presentation by -- with Dr. Mason, let's  
5 real quickly revisit this whole (b)(2) versus (b)(3), divisible/  
6 indivisible relief issue. Fair enough?

7 MR. BOIES: Yes, Your Honor.

8 THE COURT: What if where we landed on this was  
9 something along these lines? Because, again, my point is this.  
10 It's not for me to tell an opt-out what they can't do in terms  
11 of pursuing litigation. It's my job to tell them what they  
12 can't do vis-a-vis any settlement that I approve. And, again,  
13 we won't -- I appreciate the argument made yesterday by one of  
14 the objectors that, well, what are we supposed to tell our  
15 clients. Well, you tell your client if they're opting out, they  
16 pursue all the remedies they think they can get. But if it gets  
17 to a certain point where it affects my judgment, then someone  
18 will bring it to my attention and we'll have to address it.

19 So what if the language in a release, settlement  
20 agreement, notice, second notice went along these lines: A  
21 (b)(3) opt-out reserves the right to pursue divisible relief,  
22 including monetary relief and divisible injunctive relief.  
23 Divisible injunctive relief may include the right to pursue in  
24 litigation a second Blue bid. The parties acknowledge that  
25 based upon a claimant's individual business and the facts and

1 circumstances of the claims, divisible injunctive relief may  
2 include possible additional Blue bids to the extent they are  
3 merited by the circumstances surrounding the individual claimant  
4 business, provided, however, the relief pursued by an opt-out  
5 may not infringe on the indivisible (b)(2) injunctive relief  
6 approved by the Court.

7           Wouldn't it be that simple? And other than that, I  
8 don't know how I can legislate anything else.

9           MR. ZOTT: Well, from our perspective, Your Honor --  
10 David Zott. We agree that that's the general concept. And I  
11 think to go beyond that would be -- I think you'd have a problem  
12 because you're now -- at that point, you almost are issuing an  
13 advisory opinion that's divorced from the specific facts and  
14 circumstances, ironically. So I think that's the construct.  
15 And we're working with the subscribers on language to try to get  
16 to an acceptable construct.

17           MR. BOIES: I agree with that, Your Honor. I think  
18 everything --

19           THE COURT: You agree with that or that?

20           MR. BOIES: I agree with both --

21           THE COURT: Okay.

22           MR. BOIES: -- in the sense that I agree that what the  
23 Court has said is exactly the right analysis. And I also agree  
24 with counsel that we are working together to try to come up with  
25 language that we can agree on that --

1 THE COURT: Language that will look prettier in a  
2 document.

3 MR. BOIES: And our concern is simply that we give the  
4 class adequate notice. And I think the principles that the  
5 Court articulates are exactly the right principles, and the  
6 question is how do we be sure that we have implemented those  
7 principles in a way that gives the class adequate notice.

8 THE COURT: Well, my point is this. I appreciate the  
9 fact that counsel for an opt-out may want to have an opportunity  
10 to advise the opt-out of what the opt-out's legal rights are  
11 going forward. I don't think you can advise -- I don't think we  
12 can give you enough information, though, for you to advise the  
13 opt-out of what the outcome is going to be if they go forward.

14 And quite frankly, no lawyer can do that, even in the  
15 context of, you know, a single party on either side of the (b)  
16 litigation. You have a landscape of the law. You think you  
17 know the facts of your case. You give them advice about what  
18 the outcome of that case might be, but there's no guarantees  
19 based upon any legal principles as to what the outcome of your  
20 case is going to be because it's going to largely be applying  
21 the law to the facts of the case.

22 Having said that, I think there's two things you can  
23 tell your opt-out client. First, you have a right to pursue any  
24 divisible relief that would be appropriate in your case. You  
25 don't have the right to pursue any relief that would undermine a

1 class settlement enjoyed by millions of others. Okay? And I  
2 think that -- isn't that clear enough?

3 MR. BOIES: I think it is -- I think it is absolutely  
4 clear as a matter of principle. I think we have an unusual  
5 situation here because of the fact that we have both a (b)(2)  
6 and a (b)(3) injunctive relief class. And I think that in the  
7 usual case, you get a very broad release and no one ever defines  
8 what it means. And as the Court just noted in connection with  
9 the provider case, people afterwards have to litigate what it  
10 means. And that's --

11 THE COURT: That's what happened early in this case.

12 MR. BOIES: Exactly.

13 THE COURT: We had -- the providers came in. You know,  
14 I asked Judge Moreno: All right. Judge Moreno, this is your  
15 settlement, not mine. I think it's -- you know, unless you're  
16 going to tell me you want me to do it, I'm going to ask you to  
17 define what the rights are of the parties in my case.

18 And I think he reserved jurisdiction to do just that in  
19 the *Managed Care* settlement. So he made a decision, got  
20 appealed to the Eleventh Circuit, and it was for me to apply the  
21 Eleventh Circuit case. And I think I did that in document 2324  
22 on the partial summary judgment against certain defendants that  
23 were not signatories to the settlement agreements in *Love versus*  
24 *Blue Cross Blue Shield Association*.

25 MR. BOIES: I don't remember the docket number, but I

1 do remember the Court doing it. And I think that --

2 THE COURT: I don't remember the document either. I'm  
3 just reading it.

4 MR. BOIES: I think that just illustrates the point I'm  
5 making, which is that in a usual case, there's no advisory  
6 opinion, there's no -- there's no definition of exactly what  
7 people can and can't do other than the general statement and the  
8 nature of the release.

9 I think the thing that we're -- I wouldn't say  
10 struggling over but that we're addressing is how we make sure  
11 that that's applicable to a case where you have both a (b) (2)  
12 and a (b) (3) injunctive relief class. And I think the Court's  
13 language is very good on that. And that language may very  
14 well -- we end up believing it's sufficient, but we just want to  
15 have a chance to really think about it in a thoughtful way.

16 THE COURT: I will give you my best -- I'll give  
17 everyone my best paragraph that I can come up with by the end of  
18 the day, and you can take that and do with it as you may.

19 MR. BOIES: Right.

20 THE COURT: All right?

21 MR. BOIES: Thank you, Your Honor.

22 MR. LOWREY: Your Honor, could I be heard on the  
23 (b) (2) / (b) (3) question that you just addressed in the settlement  
24 context?

25 THE COURT: Very briefly, because I think we've pounded

1 this into submission.

2 MR. LOWREY: Well, I guess very briefly, it is exactly  
3 the function of a release to tell me what I can't do in  
4 subsequent litigation. That's what releases do.

5 This can't be a conventional release because we're  
6 carving up (b) (2) and (b) (3) and divisible and indivisible  
7 injunctive relief. And so my question, quite simply, is this.  
8 You know, when I -- am I releasing a claim to seek unlimited  
9 Blue bids? And if the answer is yes, then, you know, we can  
10 object and appeal on that basis. If the answer is no, you know,  
11 I'm good. But the release ought to be clear enough to tell me  
12 that. Just as we're carving up damages --

13 THE COURT: What would be your argument --

14 MR. LOWREY: I'm sorry?

15 THE COURT: What would be your argument in the court  
16 you file in as to why you're entitled to 36 Blue bids? It would  
17 be based on the facts and circumstances of your case; right?  
18 First of all, I think your argument would be, when you get to  
19 that other court, the Blues cannot agree together --

20 MR. LOWREY: Right.

21 THE COURT: -- not to give me a bid.

22 MR. LOWREY: It's bid-ridden. Yeah.

23 THE COURT: Right? And they would have to defend that.

24 MR. LOWREY: Well, they'll defend it by saying you  
25 released that claim, Mr. Lowrey.

1 THE COURT: Well --

2 MR. LOWREY: Look at this settlement, this (b) (2)  
3 settlement that you were stuck in. You released that claim.

4 And we shouldn't be arguing after the fact about  
5 something like this. This -- you know, the claims that we give  
6 up and don't give up are going to be defined by the release.  
7 This isn't a question where there's like a general judgment  
8 and --

9 THE COURT: You haven't released a claim, first of all,  
10 because you have opted out. You have the (b) (3) monetary  
11 damages claim. All right?

12 MR. LOWREY: Well --

13 THE COURT: So that's -- hold on.

14 MR. LOWREY: I'm sorry.

15 THE COURT: Yes. You have the claim. You can pursue  
16 money damages on that claim. So you've not released the claim.

17 MR. LOWREY: I've not released --

18 THE COURT: What they may argue is the relief you're  
19 seeking violates -- essentially would undermine a (b) (2)  
20 injunctive relief award by a different court that has continuing  
21 jurisdiction over that (b) (2) relief. So it's not a matter of  
22 release. I think you're mixing apples and oranges here. It's a  
23 matter of whether you're precluded, for example, under the All  
24 Writs Act, from pursuing that particular remedy. It's not  
25 waiving the claim. It's not releasing a claim. It's whether

1 you can pursue that particular remedy.

2 And depending upon the circumstances, I can't tell you  
3 whether you can pursue that particular remedy because I'm -- you  
4 haven't filed that case. But what I can tell you is that if you  
5 pursue a remedy that's consistent with -- that doesn't undermine  
6 the (b)(2) relief I'm contemplating here, you'll be fine. If  
7 you pursue a remedy that undermines the (b)(2) relief that I may  
8 or may not approve, you will not be fine.

9 MR. LOWREY: Well --

10 THE COURT: It's not a release. Okay? So I think I've  
11 heard your argument. I think it's time to move on.

12 MR. LOWREY: Thank you, Your Honor.

13 THE COURT: Thank you.

14 Does anybody disagree with me that it's not a release,  
15 it's just a matter of what relief can be sought? And it's an  
16 All Writs Act issue unless the court recognizes that -- the  
17 second court recognizes, no, you can't do this consistent with  
18 (b)(2). I'm not going to allow you to do it.

19 MR. HAUSFELD: I think we're in agreement with the  
20 Blues on Your Honor's recitation of how this might work.

21 THE COURT: You'll have to pull that microphone closer.  
22 Right there.

23 MR. HAUSFELD: I believe the subscribers and the Blues  
24 are in alignment with Your Honor's recitation of how this would  
25 play out.



1 THE COURT: Yes. It's not a release. It may be a  
2 limitation upon certain relief that can be sought under a  
3 release, but it's not a waiver of a claim.

4 Okay. Thomas? Are you ready to get started?

5 MR. RICHIE: Your Honor, just a couple of clarifying  
6 questions, one on the issue that you're addressing right now,  
7 one on the issue that's next on the agenda. I'm trying to save  
8 time, not waste it.

9 THE COURT: I'm all for that.

10 MR. RICHIE: The issue about the scope of a release and  
11 the relief, I just want to be clear what the Court is  
12 considering at this point. Is this a proposed new class for  
13 which there will be the normal Rule 23(e) process of preliminary  
14 approval, notice, a chance to object, opt out, and then a  
15 fairness hearing? Or is this something the Court is proposing  
16 to approve --

17 THE COURT: I think we're holding a fairness hearing  
18 right now. I think I've --

19 MR. RICHIE: So --

20 THE COURT: Okay. So no, I think what we're talking  
21 about is when the -- I think we've all agreed that if this  
22 distinction occurs, there will have to be notice to the ASO  
23 class. I don't think we're thinking about picking and choosing  
24 who gets notice. It's the ASO class; right?

25 Mr. Burns, am I right about that?

1 MR. BURNS: Yes. That's correct, Your Honor.

2 THE COURT: Okay. With an opportunity to reconsider  
3 whether they want to opt out.

4 MR. RICHIE: Your Honor, I just -- I don't understand  
5 exactly how any of this may or may not affect my client's  
6 rights. And --

7 THE COURT: It may.

8 MR. RICHIE: It may not. But at this point, we have to  
9 just raise the procedural objection that --

10 THE COURT: What's the procedural objection?

11 MR. RICHIE: That any proposed class that has not yet  
12 been certified or proposed has to go through the full Rule 23(e)  
13 process.

14 THE COURT: That's what we're doing today.

15 MR. RICHIE: There hasn't been -- again, I don't know  
16 what's behind door number two. So I just, on behalf of my  
17 clients, would object that we need to have --

18 THE COURT: Well, I don't think -- does the class  
19 definition change in any way?

20 MR. BURNS: No, Your Honor.

21 THE COURT: The class definition is what the class  
22 definition is. There's been notice of that.

23 MR. RICHIE: Your Honor, yesterday I thought there was  
24 discussion about what the class definition would be. I've not  
25 seen any concrete proposal about exactly what class is proposing

1 to be certified and what the effect of opt-out rights will be.

2 THE COURT: I thought that was on a different issue.

3 But Mr. Boies?

4 MR. BOIES: Yes, Your Honor. There may be some  
5 confusion, but there shouldn't be. The class definitions aren't  
6 changing. What we have is -- we've always had an injunctive  
7 relief class and we've always had a damages class. What we're  
8 focusing on is the fact that one aspect of the injunctive relief  
9 class, the divisible aspect --

10 THE COURT: The divisible injunctive relief class under  
11 (b) (3) .

12 MR. BOIES: Exactly. And what we're saying is that  
13 rather than having all of the injunctive relief in a (b) (2)  
14 class --

15 (Telephone interference)

16 MR. BOIES: -- a portion of that injunctive relief  
17 needs to be in a (b) (3) class. And that's all that we're  
18 dealing with. We're not dealing with changing any of the  
19 claims. We're not dealing with changing any -- actually, any of  
20 the relief. The relief is the same. The injunctive relief is  
21 the same. The damages relief is the same. The people getting  
22 it are the same. The only thing that's different is that for  
23 all the reasons that we've been talking about over the last day,  
24 what we are doing is we're finding a way to give the recipients  
25 of the individualized injunctive relief an opt-out right.

1 MR. RICHIE: And, Your Honor, this sounds like a  
2 fruitful process, an important process. I just want to make  
3 sure that instead of discussing concepts in the abstract, that  
4 the class receives appropriate notice of exactly how they're --

5 THE COURT: Well, that's the whole point is I think the  
6 class gets notice. I don't think the class definition, like the  
7 scope of the class, changes in any way. It's still an ASO  
8 class. The question is going to be this. All we're telling  
9 them is, you know, this may not have been clear to you before;  
10 but if you opt out, you can pursue (b) (2) and (b) (3) -- I'm  
11 sorry -- (b) (3) monetary damages and (b) (3) divisible injunctive  
12 relief. Okay? You don't lose your second Blue bid if you opt  
13 out. Your opt-out right is not being burdened. And if you do  
14 decide to opt out, then you can file your suit. You can  
15 individually claim that.

16 Now, here's the caveat. What you can't do is  
17 collaterally attack or undermine this settlement that everybody  
18 else has agreed to on a classwide basis.

19 And I think -- so I don't think it's anything -- I  
20 don't think there's anything that burdens that class. It's  
21 actually good news. You can opt out and pursue claims that  
22 maybe -- a claim that maybe wasn't clear to you as far as remedy  
23 or you thought might have been unavailable to you if you opted  
24 out. And we're giving you the -- we're giving you the chance to  
25 make another decision about whether you want to opt out.

1 MR. RICHIE: Certainly, Your Honor.

2 THE COURT: I think this is a mulligan, not anything  
3 else, a mulligan with more information.

4 MR. RICHIE: Again, I have no -- I have nothing but  
5 hope for the substance.

6 THE COURT: Yes.

7 MR. RICHIE: Just not knowing what's behind door number  
8 two, I have to object on procedural grounds. It might be  
9 that --

10 THE COURT: Well, what's the procedural ground?

11 MR. RICHIE: So this may affect clients' opt-out  
12 rights. This may affect their decision to opt out. The  
13 changing of relief from (b)(2) to (b)(3) may raise  
14 individualized issues that can't be properly certified.

15 THE COURT: No. That actually gives them more  
16 opportunity to opt out. That doesn't change -- if it changes  
17 their opt-out right, it changes it to their benefit. And it  
18 way -- can you explain to me how this in any way would  
19 negatively affect someone who's now been given a second choice  
20 about whether they wish to opt out of the same settlement?

21 MR. RICHIE: So, Your Honor, my problem with answering  
22 that question, which I would love to be able to answer, you said  
23 what is the problem with this or with it. And I don't know what  
24 exactly "it" or "this" is. It's not written down anywhere.  
25 We've never had notice of it. Now, I understand we're going to

1 get notice, but I don't know the scope of exactly what is going  
2 to change.

3 THE COURT: Well, just as there will be an opportunity  
4 to make a decision about whether to opt out, you can object to  
5 the notice. We might have to deal with that. I don't think  
6 anybody would be surprised if we get an objection to the notice,  
7 would you?

8 MR. BURNS: No.

9 MR. RICHIE: I just --

10 THE COURT: Okay. So we'll deal with that if and when  
11 it comes. But the point is when you say, I don't know what "it"  
12 and "this" is, "it" and "this" is what it always has been. When  
13 you opt out, you have a right to seek individualized relief.  
14 That's *American Home Shield*. That's the case that always comes  
15 to mind when I think about this -- okay? -- for the reasons I  
16 explained yesterday.

17 "This" is -- so that's "it." And "this" is you can't  
18 do anything seeking what you contend would be an individualized  
19 relief that would undermine a class-based -- a classwide  
20 settlement. Okay? That's -- that's the law. That's been the  
21 law since I became a judge.

22 Now, how it plays out in each case and the permutations  
23 in each case, you're right, I can't make any promises to you  
24 about how those pretty pillared legal principles might get  
25 applied to whatever claim you dream up for a client that hasn't

1 even filed a suit yet, hasn't even opted out yet. But that's no  
2 different than the beginning of any other lawsuit, as I  
3 explained earlier.

4 MR. RICHIE: So, Your Honor, as I understand our  
5 colloquy right now, you're talking about what happens in a  
6 future case. And I guess what I'm trying to say is I just want  
7 to be clear on precisely what is being considered today in this  
8 hearing. Just is there --

9 THE COURT: We are considering whether we ought to  
10 reclassify divisible injunctive relief under the ASO class  
11 definition as (b)(3) divisible injunctive relief.

12 (Telephone interference)

13 THE COURT: All right. Folks, I'm -- this is going to  
14 be a long day. I am not in a great mood right now, to be honest  
15 with you. Everybody get your phones out right now and turn them  
16 off. Okay? Just make sure they're off.

17 Okay. So if you need to use your phone, step out and  
18 then turn it off before you come back in. Let's just not have  
19 that continuing today.

20 All right. So back to you, Thomas. I'm struggling  
21 with what you're trying to articulate. I think what you're  
22 trying to articulate is we don't know what might happen if we  
23 opt out and file a suit.

24 MR. RICHIE: No --

25 THE COURT: Guess what? You're aligned with every

1 other party who's ever filed litigation, then, because we don't  
2 know what's going to happen if you file suit. What I can tell  
3 you is two things: One, you can pursue individualized  
4 injunctive relief. That's unique. Can you -- I don't know many  
5 cases where we've dealt with this issue.

6 MR. RICHIE: So --

7 THE COURT: I've never had one. And I don't know that  
8 there's a whole lot in American jurisprudence. So we're on a  
9 little bit of a cutting edge here. I acknowledge that.

10 But we have some tried-and-true principles that help us  
11 navigate this field. And that is it's -- you know, there are  
12 situations in which the monetary relief that a party would  
13 pursue might undermine a class settlement, and they may be  
14 prohibited from doing that. I so ruled in *American Home Shield*.  
15 I said there are certain monetary claims you can't pursue  
16 because of the settlement despite the fact that you've opted  
17 out.

18 So you could just as easily be standing here in a more  
19 traditional -- on a more traditional issue saying we're not sure  
20 exactly what monetary damages claims we can assert on behalf of  
21 our client in this other case. And I'd say, well, I understand  
22 that. We'll just have to see how that works its way out.

23 Now, but again, all we're doing is for the benefit of  
24 the ASO class, not in any way to the detriment of the ASO class.  
25 We are doing two things. We are considering reclassifying to



1 subdivision (b)(3) of Rule 23 the divisible injunctive relief  
2 they might pursue, and we are giving them an opportunity to  
3 reconsider the decision they've already made about whether to  
4 opt out. That's all.

5 MR. RICHIE: So --

6 THE COURT: Does anybody think we're doing anything  
7 else?

8 MR. BURNS: No, Your Honor.

9 THE COURT: All right. So anything else?

10 MR. RICHIE: No, Your Honor. I'll move on.

11 The other thing that I was going to propose to save  
12 time today, both the objectors and the settlement proponents  
13 have put forward expert testimony by declaration. This proposed  
14 schedule, which, again, we weren't consulted on, proposes to  
15 have --

16 THE COURT: You were consulted on it. That's why I  
17 asked you earlier, at the beginning.

18 MR. RICHIE: Oh, indeed. I was consulted 20 minutes  
19 ago.

20 THE COURT: You got it about, I don't know, an hour  
21 after I got the proposal. So --

22 MR. RICHIE: Certainly. Your Honor, we would propose  
23 that the parties put in their direct testimony by declaration.  
24 We don't have any need to replot that ground. If those  
25 witnesses weren't here, the Court would consider their

1 declarations in the record. And we could just dispense with  
2 that two hours of time.

3 THE COURT: What does everyone think of that? I can  
4 read.

5 MR. CRAMER: Your Honor, we support that.

6 THE COURT: All right. So I won't hear any live  
7 testimony from -- which experts are we specifically referring  
8 to?

9 MR. RICHIE: Your Honor, there are two experts here  
10 today, one for the self-funded subclass --

11 THE COURT: Are we talking yours and Dr. Mason both?

12 MR. RICHIE: Yes.

13 THE COURT: Everyone -- anyone just really thought, I  
14 got my popcorn, I bought my ticket, I wanted to see this?

15 MR. RICHIE: And excuse me, Your Honor. Just to  
16 clarify, we do want to cross-examine them and leave the door  
17 open for recross but except in the style, perhaps, of an  
18 arbitration.

19 THE COURT: So you're just saying we would dispense  
20 with the direct --

21 MR. RICHIE: Yes. We will treat --

22 THE COURT: -- and just get right to the crucible of  
23 cross.

24 MR. RICHIE: That's my proposal, Your Honor.

25 THE COURT: Okay. So we do want to keep the popcorn in

1 hand.

2 MR. RICHIE: Yeah. But we want to skip straight to the  
3 popcorn part and dispense with the part where they read the  
4 declaration into questions.

5 MR. BOIES: We agree, Your Honor, that we can go right  
6 to cross-examination. We don't have to --

7 MR. BURNS: Actually, Your Honor, on behalf of the ASO  
8 subclass, I think we would prefer to keep direct to ground the  
9 Court in the principles that are at stake.

10 (The court reporter interrupts for clarification)

11 THE COURT: Yes. Guys, we have to remember my court  
12 reporter can't hear you with a mask on if you're not near a  
13 microphone.

14 MR. BURNS: Thanks, Thomas.

15 Your Honor, we would actually like to maintain the  
16 direct. And we'll try to make it as brief as possible, but --

17 THE COURT: How long is your direct going to be?

18 MR. BURNS: I can probably cut it down to 30 minutes,  
19 Your Honor.

20 THE COURT: You have 15.

21 MR. BURNS: Fifteen will work too.

22 THE COURT: All right.

23 MR. BURNS: Thank you.

24 THE COURT: That will be the warm-up.

25 MR. BURNS: Thank you.

1 THE COURT: Now, are there any disputes about any of  
2 the parties' expert qualifications?

3 MR. RICHIE: Your Honor --

4 THE COURT: That would go to the admissibility of their  
5 opinion as opposed to the weight to be given to it.

6 MR. RICHIE: Your Honor, we believe that after the  
7 Court has heard the bases for Dr. Mason's testimony, it will  
8 discredit him in its entirety. But he's a --

9 THE COURT: I'm sure you think that.

10 MR. RICHIE: He's a Ph.D. We're not going to that --

11 THE COURT: But the question is does anybody think that  
12 it's not admissible under the 700 series? That's the question  
13 I'm asking.

14 MR. RICHIE: Not as an initial matter until the Court  
15 has heard the testimony.

16 MR. BOIES: Your Honor, with respect to the objectors'  
17 witness, we're content to have the Court hear the testimony and  
18 then make a decision afterwards about what weight, if any, and  
19 what qualifications, if any --

20 THE COURT: That's the question is what weight should  
21 be given to it, not whether it's admissible.

22 MR. BURNS: And from the subclass, Your Honor, I think  
23 that's clearly in your discretion.

24 THE COURT: All right. Then are we ready to start with  
25 that?

1 MR. BURNS: The subclass is ready, Your Honor.

2 THE COURT: All right. Let's call Dr. Mason.

3 The good news is, Mr. Burns, you have 15 minutes.  
4 That's the bad news, actually. The good news is that I will not  
5 apply the Judge Clemon rule. The light will not go on right at  
6 15 minutes. I'll let you wrap it up if you're not wrapped up by  
7 then.

8 MR. BURNS: Well, thank you, Your Honor.

9 And, Your Honor, you mentioned this morning wanting a  
10 brief summary at the outset in lieu of formal arguments on the  
11 submissions. Is that still the case?

12 THE COURT: Yes. Just give me an overview of where  
13 you're going with this.

14 MR. BURNS: Okay. Happy to do that, Your Honor.

15 So obviously, Dr. Mason has submitted an expert report.  
16 He's an expert economist. He's been qualified in courts  
17 throughout the country.

18 I think it's very important to understand one thing,  
19 and we will get this out for sure in his direct testimony.  
20 Dr. Mason used four separate, independent analyses to inform his  
21 consideration of the reasonableness of the allocation in this  
22 case. The self-funded objectors spend dozens of pages in nearly  
23 60 pages of briefing attacking one of those methodologies. As  
24 to two of the remaining methodologies, their experts agree that  
25 they're generally informative of the question in the case. And

1 as to the fourth, they state that they don't really understand  
2 it. So let's just ground ourselves and be clear. One out of  
3 four is the only analysis that is really substantively being  
4 attacked, and we'll go over reasons why the attacks just aren't  
5 relevant in the context of this case.

6           These are the types of analyses, the types of  
7 questions, that any expert antitrust economist would ask in a  
8 case like when trying to consider a settlement allocation. And  
9 Dr. Mason's testimony and the work he's done in this case  
10 clearly fall into the norm of what an expert antitrust economist  
11 would do. Fundamentally, Your Honor, the one thing that I do  
12 want to leave the Court with with respect to the self-funded  
13 objectors' objections is that there is a basic failure in their  
14 analysis. And that relates to an acceptance and understanding  
15 that there are two different markets in this case, one for ASO  
16 services, one for the fully insured.

17           (Telephone interference)

18           THE COURT: Did somebody not turn a phone off?

19           All right. Guys, seriously, this is kindergarten  
20 stuff. We turn phones off when we're in a courtroom,  
21 particularly when the judge, just ten minutes ago, said turn  
22 your phones off.

23           All right. Go ahead.

24           MR. BURNS: All right, Your Honor. And just briefly on  
25 that point, Dr. Mason will discuss briefly why the markets are

1 separate and why that impacts his analysis. Because the markets  
2 are different, the ASO market and the fully insured markets can  
3 bear levels of overcharges that are different. But it's that  
4 distinction between the market, so it's very important for the  
5 Court to understand.

6 So unless the Court has questions for me, I'll call  
7 Dr. Mason.

8 THE COURT: Call Dr. Mason.

9 MR. BURNS: Dr. Mason, would you come to the stand.

10 THE CLERK: Raise your right hand.

11 (The witness is administered the oath)

12 THE CLERK: Thank you. State your name for the record,  
13 first and last name for the record.

14 THE WITNESS: Joseph Mason.

15 THE CLERK: And spell your first and last name.

16 THE WITNESS: J-O-S-E-P-H, M-A-S-O-N.

17 MR. BURNS: Your Honor, with your permission, may I  
18 hand out a couple of hard-copy exhibits?

19 THE COURT: You may.

20 MR. BURNS: Thank you.

21 THE COURT: And you need not further seek permission to  
22 approach him and hand him things.

23 MR. BURNS: Thank you, Your Honor.

24

25

1                                   **JOSEPH MASON, Ph.D.**

2   The witness, having sworn or affirmed to speak the truth, the  
3   whole truth, and nothing but the truth, testified as follows:

4                                   DIRECT EXAMINATION

5   BY MR. BURNS:

6   Q.   Dr. Mason, good morning.

7   A.   Good morning.

8   Q.   And notwithstanding careful preparation, we're going to try  
9   to make this quick and to the point.   So I have handed you two  
10  things, Dr. Mason.   One is a copy of, in your case, your  
11  unredacted report, and the second is a PowerPoint slide deck.

12               MR. BURNS:   And just so the Court can understand,  
13  Dr. Mason's exhibits to his report were submitted under seal.  
14  And by agreement with the defendants, we're not going to place  
15  these slides on the screen.   We'll just go over them in the hard  
16  copy.

17  Q.   So, Dr. Mason, is the declaration that I have handed you  
18  your declaration in this case?

19  A.   Yes, it is.

20  Q.   And is that the only declaration that you've submitted in  
21  this case?

22  A.   Yes.

23  Q.   And did you prepare it personally?

24  A.   I did.

25  Q.   And does it contain the opinions you're willing to offer in



1 this case?

2 A. Yes.

3 Q. All right. So turning to the first page in the slide deck,  
4 which is an excerpt of page 3 in your declaration, paragraphs 13  
5 and 14, are these the opinions you're prepared to offer,  
6 Dr. Mason?

7 A. They are.

8 Q. And what is your opinion as to the reasonableness of the  
9 settlement allocation in this case?

10 A. My opinion is that the allocation of six and a half percent  
11 of the settlement amount to the self-funded claimants is  
12 reasonable after taking into account relative differences in the  
13 markets for self-funded and fully insured arrangements, the  
14 difference in the class period applicable to each class, and the  
15 relative circumstances of each in the context of this  
16 litigation.

17 Q. So, Dr. Mason, those are considerations that I believe you  
18 made in tendering your opinion in this case; is that right?

19 A. That's correct.

20 Q. And I do want to address some of those in turn because I  
21 think they are important for the Court to consider. So let us  
22 turn to the second page in your slide deck.

23 Now, the first consideration that you mention are  
24 differences in the markets. So, Dr. Mason, is it your opinion  
25 or is it your understanding in this case that the ASO and fully

1 insured markets are, indeed, different?

2 A. Yes.

3 Q. And are there unique characteristics that attach to both?

4 A. Absolutely.

5 Q. All right. So looking at the slide, Dr. Mason, at the top  
6 of the slide are bullet points relative to some of those  
7 characteristics. And I'd first like you to explain for the  
8 Court the unique characteristics that fall within the fully  
9 insured market and how they informed your opinion.

10 A. Fully insured products are sold to a market that values not  
11 only the administrative services of claims processing and other  
12 administrative services like that, but also seeks to purchase  
13 risk transfer or risk certainty in terms of the arrangements;  
14 that is, the certainty that they'll only pay a certain amount no  
15 matter how high their health costs go in a particular year.

16 Q. And you also mentioned fewer substitutes under the fully  
17 insured market. What do you mean by that?

18 A. These fully insured arrangements are purchased from  
19 insurance companies, per se. They're one specific product that  
20 can only be bought from one specific type of company.

21 Q. Okay. And is it your understanding that -- and with respect  
22 to substitutes, is that sometimes interchangeable with the  
23 competition, other offerings from other companies?

24 A. Sure. Generally, the more substitutes there are for a good,  
25 the less -- or the more difficult it is for a supplier of those

1 goods to hold up prices to an artificially high level.

2 Q. Okay. Now, Dr. Mason, did you observe that there was  
3 greater or less competition in the fully insured market as  
4 opposed to the self-funded market?

5 A. Less competition in fully insured than in self-funded.

6 Q. Okay. So let's take a look at the self-funded market  
7 characteristics you've identified. Would you explain this to  
8 the Court.

9 A. In self-funded markets, you're -- you're purchasing the  
10 administrative services from the supplier here. You may be  
11 purchasing other things as well, but you're not necessarily  
12 purchasing that risk transfer from anybody or from an insurance  
13 company necessarily. There are a lot of different ways to take  
14 care of that. Or, of course, you can substitute and purchase a  
15 fully insured plan if you want. So this greater degree of  
16 substitutability creates greater options for those who  
17 participate in the ASO market.

18 Q. So is it your view, then, that there was greater competition  
19 in the ASO market, or self-funded market?

20 A. Yes.

21 Q. Okay. The next item you have on this -- on this slide deck  
22 sheet relates to price sensitivity. And that is an antitrust  
23 economics term, is it not, Dr. Mason?

24 A. Yes.

25 Q. Okay. And can you explain for the Court what you generally

1 mean by price sensitivity?

2 A. Price sensitivity, it's typically referred to price  
3 sensitivity of demand. That is the ability of the customer to  
4 go elsewhere if a single supplier raises their prices.

5 Q. Okay. And in your view -- did you make any observations as  
6 to whether the markets in this case were either more or less  
7 price sensitive?

8 A. My opinion is that the market for fully insured arrangements  
9 is less price sensitive than the market for self-funded  
10 arrangements.

11 Q. Now, Dr. Mason, the final entry on this page refers to an  
12 ability to sustain overcharges. What do you mean by that  
13 concept?

14 A. I mean that because there's less price sensitivity in the  
15 fully insured market because there are less alternatives, the  
16 suppliers of fully insured plans can raise prices on those plans  
17 more -- in context, a monopoly power can raise prices  
18 artificially -- by more than they can with regard to markets for  
19 self-funded with greater -- greater number of alternatives, face  
20 greater competition and, therefore, are more price-sensitive.

21 Q. Okay. So to boil this down to one concept, Dr. Mason, as an  
22 expert economist or an antitrust economist and as a matter of  
23 antitrust principles, would you expect to see in this case that  
24 the fully insured market could sustain larger overcharges?

25 A. Absolutely. This is Economics 101.

1 Q. Okay. Now, Dr. Mason, if you'll turn to the next page, you  
2 have a slide on relative profitability, and I just want to touch  
3 on one or two concepts. First, why do you want to discuss  
4 relative profitability, and how does that bear on your analysis?

5 A. I discuss relative profitability because at all times here,  
6 we're allocating a settlement in a case where damages are based  
7 on this overcharge, this ability to charge more due to monopoly  
8 power. So we want to get closer and closer to overcharge in  
9 everything that we do here. All overcharge must derive from  
10 profit, though not all profit is overcharge. So the next step  
11 here is to look not just at markets in general, but to look at  
12 indicia of overcharge. So the next step is to look at profit.

13 Q. Okay. And so, Dr. Mason, just to zero in on that point, you  
14 said that all overcharge is profit; is that correct?

15 A. That's right. Overcharge has to be a subset of profit.

16 Q. But all profit is not overcharge. Is that fair?

17 A. That's correct. I'm not an expert on the law, but I don't  
18 know that it's illegal to profit.

19 Q. Now, costs are distinct -- or expenses that a firm has to  
20 pay are distinctive -- are distinct from profit and overcharges,  
21 are they not?

22 A. Yes. Costs are subtracted from revenue on the way to  
23 becoming profit. And generally costs are thought to be equal  
24 among both products supplied here. There's nothing  
25 controversial about that.

1 Q. Now, just a couple of questions before we move on to your  
2 financial analyses in this case. Dr. Mason, you, in conducting  
3 those financial analyses, made deductions for litigation risk  
4 and for relative profitability; is that correct?

5 A. That's correct.

6 Q. And I just want the Court to understand. Are these -- first  
7 of all, you've been qualified as an expert in assessing  
8 settlement allocations; is that correct?

9 A. That's correct.

10 Q. And how many times have you done that?

11 A. Somewhere in the neighborhood of ten times.

12 Q. Okay. And have you employed deductions like litigation risk  
13 and profitability in that context?

14 A. Absolutely.

15 Q. And are those standard deductions or standard inquiries that  
16 an expert economist like yourself would make in the context of  
17 assessing the reasonableness of an allocation?

18 A. Absolutely.

19 Q. Okay. Now, Dr. Mason, if you'll turn with me to page 7 in  
20 the slide deck, we've been talking generally about  
21 considerations that are relevant for your inquiry into the  
22 reasonableness of the settlement allocation in this case, but  
23 did you conduct specific financial analyses to assess the  
24 reasonableness of that settlement allocation?

25 A. Yes, I did.

1 Q. Okay. And how many?

2 A. As you noted earlier, I conducted four analyses, two of  
3 which I conducted two different ways.

4 Q. Okay. And looking at slide deck number seven, are these the  
5 four analyses that you performed in this case?

6 A. Yes, they are.

7 Q. And so they --

8 A. These are the results of the four.

9 Q. I'm sorry, Dr. Mason.

10 A. I'm sorry. These are the results of the four. Yes.

11 Q. Okay. And so we have gross revenue, net revenue, operating  
12 gain, and revenue per member growth. Is that fair?

13 A. That's correct.

14 Q. Okay. So let's focus, Dr. Mason, turning to page 8 in the  
15 slide deck, on adjusted gross revenue. Can you describe for the  
16 Court your methodology in conducting this analysis?

17 A. Sure. First I begin this analysis -- I began my analysis in  
18 general by obtaining quarterly financial reports and quarterly  
19 enrollment reports that were supplied by the BCBS licensees.

20 Those record revenues and enrollment that is the subject matter  
21 of this case. It has to do with BCBS-licensed plans that are  
22 alleged to have been affected by horizontal restraints.

23 Q. And just to stop you there for a second, Dr. Mason, did you  
24 have an opportunity -- or you or your team -- to speak to Blue  
25 Cross Blue Shield and inquire as to the sources for that data

1 and the data itself?

2 A. Absolutely. We had extensive discussions with BCBS about  
3 the data, its content, its nature --

4 Q. Okay. Thank you.

5 A. -- before we proceeded.

6 Q. So sorry to interrupt. You were describing your methodology  
7 in the use of these reports.

8 A. So that was important because certain covered lives or  
9 enrollees are not part of this lawsuit, government employees,  
10 state and local government employees and the like. So we needed  
11 to adjust the overall numbers of -- for those lives that were  
12 not part of this lawsuit.

13 After doing so, we began to undertake the four analyses  
14 here. The first one, the slide -- on slide eight, which you  
15 have before you, is the gross revenue analysis. This is our  
16 starting point. This is the simplest comparison available out  
17 of the four. Its value is that it's simple. Of course, it has  
18 other liabilities to it too, as objectors note, but the value is  
19 that --

20 Q. And so can I just stop you --

21 A. -- it's simple.

22 Q. Thank you, Dr. Mason. Just stopping you there, just so the  
23 Court's clear, you were -- you were analyzing and assessing the  
24 reported revenue for the self-funded subclass versus reported  
25 revenue for the fully funded subclass; is that right?



1 A. That's correct. That revenue reported by the BCBS entities  
2 at issue in this case.

3 Q. Okay. And what conclusion did this lead to in your  
4 financial analysis, if you can describe that?

5 A. So if we undertake this comparison, add up the revenue, we  
6 get a proportional allocation to the self-funded class of 1.7  
7 percent.

8 Q. Okay. Now, Dr. Mason, you're aware that the self-funded  
9 objectors have lodged various arguments with respect to your  
10 gross revenue analysis and attacked it as unsound. Is that your  
11 understanding?

12 A. Yes.

13 Q. Okay. And what's the basic criticism that you have taken  
14 from the objectors' papers?

15 A. I -- I would say there are two at its heart. The first is  
16 there's an assumption, which they state is an assumption they  
17 make, that when I present total self-funded revenue in slide  
18 eight, that that is only ASO fees. That is incorrect. And --

19 Q. Just to pause you there, it's incorrect why?

20 A. Because it's total self-funded revenue. Even the way that I  
21 describe how this data is treated -- and as I understand, this  
22 description was provided verbatim in the Burns memorandum that  
23 was issued for some purposes in this matter much earlier -- I  
24 utilize this quarterly financial report data supplied by the  
25 BCBS entities. And what they supply is total revenue, total

1 actual revenue, and they supply premium revenue to fully  
2 insureds. I subtract from total revenue premium revenue to  
3 fully insureds in order to obtain this total self-funded  
4 revenue. So this category is not limited to ASO fees.

5 Q. And so I believe what you're --

6 A. It is a residual remainder.

7 Q. And I believe what you're saying is the remainder you're  
8 describing includes revenue from ASO fees and any other -- any  
9 other revenue that the Blues associate and report with -- in  
10 that regard; right?

11 A. That's correct. It contains every --

12 THE COURT: Repeat that question.

13 MR. BURNS: Sure. So the ASO revenue that Dr. Mason is  
14 focused on in his analysis includes both ASO fees as well as any  
15 other items of revenue that would flow to the ASO submarket,  
16 according to the Blues.

17 THE COURT: Thank you.

18 Q. Is that correct, Dr. Mason?

19 A. That is correct.

20 Q. Okay. And that was your first -- your first explanation of  
21 the criticism. What was your -- what was your understanding of  
22 the additional criticism that the objectors lodged?

23 A. The second point seems to be that objectors say I should not  
24 stop here with the revenues associated with the horizontal  
25 allocation scheme but should take into account all of the

1 expenditures that are made by companies on health care.

2 Q. And so the distinction here is that the premium paid -- the  
3 revenue associated with fully insured premium includes revenue  
4 that the Blues may pay to other third parties; is that correct?

5 A. Right. I was thinking that as a third that I left out. But  
6 this is somewhat separate. They're saying we go beyond the  
7 horizontal allocation scheme. But there is also the criticism  
8 that they offer that I include, for fully insureds, money that  
9 is paid to third-party providers and I do not include that for  
10 the self-funded portion of this comparison.

11 Q. And the Blues, in the documents that you reviewed, do not  
12 report payments in the ASO market that might be made to  
13 third-party providers as part of their revenue; is that correct?

14 A. That's correct. It's just not revenue to the firm. It  
15 hasn't been taken into their possession in the normal course of  
16 business the same way that, say, a firm that sells microphones  
17 receives money in return for those microphones and accounts for  
18 that money as revenue and subtracts from it costs and derives  
19 profit.

20 Q. And the objectors say that you should have used something  
21 called a premium equivalent; is that right?

22 A. That's right.

23 Q. And you're an expert economist. You've conducted this gross  
24 revenue analysis before. Have you ever used anything called a  
25 premium equivalent in an analysis?

1 A. No. We use premiums.

2 Q. Okay. And turning, Dr. Mason, if I may, to the next page,  
3 number 9, is it your understanding that in arguing that premium  
4 equivalents should be used, that the objectors point to the  
5 testimony of Mr. Schlegel in the *Anthem* case as suggesting that  
6 premium equivalents must be used in this type of analysis?

7 A. That's my understanding of their use of this document, yes.

8 Q. Okay. And I've called out this testimony or some excerpts  
9 of Dr. Schlegel's testimony. Now, do you have any understanding  
10 whether Mr. Schlegel was an antitrust economist?

11 A. I have no idea.

12 Q. Okay. Do you have any understanding whether he was being  
13 asked to perform a gross revenue analysis like you performed in  
14 this case?

15 A. My understanding is that he was not, given the context  
16 provided here.

17 Q. And in fact, the context that you were referring to in his  
18 testimony is that he said it was proper to use premium  
19 equivalents when assessing whether an individual Blue was  
20 meeting best-efforts requirements; is that right? Both national  
21 and local.

22 A. That's what I understand him to say, yes.

23 Q. All right. So Mr. Schlegel never said that in this type of  
24 gross revenue analysis that you're conducting, that you must use  
25 premium equivalents; is that right?

1 A. That's right. He doesn't say anything regarding overcharges  
2 in an antitrust horizontal allocation case.

3 Q. Okay. Now, turning back to page 7, the summary of your  
4 financial analyses, focusing first on gross revenue, what was  
5 the allocation to the self-funded class that your gross revenue  
6 analysis suggested would be appropriate?

7 A. 1.7 percent.

8 Q. Okay. In looking at this page, that's the lowest allocation  
9 that you reached in conducting your financial analysis; is that  
10 correct?

11 A. That's right.

12 Q. Okay. And looking at these other financial analyses you  
13 conducted, net revenue suggested an allocation somewhere under  
14 10.7 percent; is that right?

15 A. That's right. So taking the next step in my analysis, kind  
16 of thinking like objectors do, I said, well, why don't we take  
17 these claims that are paid under fully insured plans out of the  
18 mix and do the comparison there. And I get somewhere less than  
19 10.7 percent as a result of that calculation.

20 Q. Okay. So then you did an operating gain financial analysis.  
21 And that's described in your report; correct?

22 A. That's correct.

23 Q. All right. And that yielded a range of allocations.

24 A. That's correct.

25 Q. And what was that range?

1 A. I run that two different ways based upon two different  
2 observations from the record provided by BCBS licensees, and the  
3 results are somewhere between less than 3.9 percent and 6.3  
4 percent.

5 Q. Okay. And your final analysis was revenue per member  
6 growth; is that right?

7 A. That's right.

8 Q. And just so the Court understands, was that the most  
9 sophisticated of the analyses you performed?

10 A. Sure. This method follows standard econometric procedures,  
11 in fact, procedures related to the professors to whom the Nobel  
12 prize in economics in 2021 was just awarded this month.

13 Q. All right. So a couple of other questions briefly on these  
14 analyses. Did the self-funded objectors' experts take any  
15 quarrel with the use of a net revenue or operational --  
16 operating gain differential analysis?

17 A. No.

18 Q. And in fact, did they agree that those might be used in this  
19 context?

20 A. Yes.

21 Q. Okay. And how about the revenue per member growth? Did you  
22 see any criticism of that analysis?

23 A. No. The only comment they made about that was that they  
24 didn't understand it.

25 Q. Okay.

1 A. And that struck me as odd because they're saying they didn't  
2 understand what's become now mainstream economics over the last  
3 30 years, for which the Nobel Prize was just awarded this month.  
4 This is standard stuff in economics.

5 Q. Okay. So, Dr. Mason, I'm going to wrap up here very  
6 quickly. Going back to the gross revenue analysis and the  
7 information or data that the self-funded objectors maintain that  
8 you should have used or should have included -- and this is  
9 found on pages 24 through 28 of the self-funded objectors'  
10 opening brief. And I'm just going to -- well, I'll ask you  
11 first you understand that one of the sources of information that  
12 they maintain you should have used in your gross revenue  
13 analysis was medical claim costs for the self-funded class; is  
14 that right?

15 A. That's right.

16 Q. All right. Dr. Mason, as an antitrust economist, you  
17 generally take the allegations in the complaint as informing the  
18 scope of your analysis. Is that fair?

19 A. Absolutely.

20 Q. All right. Have you seen any allegations in this case that  
21 medical claim costs were somehow subject to the conspiracy  
22 alleged in this case?

23 A. No.

24 Q. All right. Have you seen any allegations that indicate that  
25 medical claim costs were somehow increased by the conspiracy

1 alleged in this case?

2 A. No.

3 Q. Accordingly, did you take these into account in performing  
4 your analysis?

5 A. I'm sorry. Take these?

6 Q. Medical claim costs in performing your gross revenue  
7 analysis.

8 A. Well, by taking them into account, my gross analysis leaves  
9 them in for fully insureds because they are revenue. So I leave  
10 them in as revenue --

11 Q. Because they're reported.

12 A. -- in a raw form. But I take them out when I perform my net  
13 revenue comparison, which Ms. Corley seems to agree is a valid  
14 approach.

15 Q. Well, and just to clarify, Dr. Mason, you weren't aware of  
16 any allegations of anticompetitive conduct that implicated  
17 medical claim costs. Is that fair?

18 A. That's correct.

19 Q. Okay. So I'm going to summarize the types of information  
20 they insist you should have used: retention of pharmacy  
21 rebates, pharmacy manufacturer incentives, pharmacy spread,  
22 ownership in specialty or mail-order pharmacies, subrogation  
23 fees, audit investigations, carve-out coordination fees,  
24 utilization management fees, stop-loss premiums, network access  
25 fees, out-of-network negotiations, data fees.



1 Dr. Mason, are you aware of any allegations in this case  
2 that any of the items I just listed were subject to the  
3 conspiracy that was actually alleged in this case?

4 A. I know of no such allegations specifically with regard to  
5 these products. And I was instructed that the revenue data that  
6 I used would contain all revenue to which the horizontal  
7 allocation scheme was applied.

8 Q. And with respect to, again, that list -- that litany of  
9 suggested information that you omitted, according to the  
10 self-funded objectors, are you aware of any allegation that any  
11 of those particular items were increased or subject to an  
12 overcharge by the conspiracy alleged in this case?

13 A. Absolutely not.

14 MR. BURNS: Your Honor, unless you have further  
15 questions, I'll --

16 THE COURT: I don't. I'll allow cross.

17 (Brief pause)

18 THE WITNESS: I'm sorry. Before we get going, I left  
19 my water bottle in the back thinking there might be one up here.

20 THE COURT: Would somebody retrieve his water bottle  
21 for him?

22 THE WITNESS: Thank you.

23 UNIDENTIFIED MALE: And while we're waiting for that,  
24 Your Honor --

25 MR. RICHIE: Your Honor, I've got one.

1 MR. BURNS: I've got one for him.

2 MR. RICHIE: Your Honor, may I?

3 MR. BURNS: Oh, thanks.

4 THE WITNESS: Thank you so much.

5 THE COURT: You almost had three water bottles.

6 You may proceed when you're ready.

7 MR. CRAMER: Thank you, Your Honor.

8 And may it please the Court, Phillip Cramer for the  
9 national account group in this case.

10 Your Honor, with Mr. Richie, we will be -- we've  
11 coordinated our cross-examination so as not to plow the same  
12 ground. I will be covering the injunctive relief portions of  
13 his opinion and the market definition with which he just  
14 started, and then Mr. Richie will go into the allocation issues  
15 that are subject to their objection.

16 THE COURT: How much time do you think you're going to  
17 allot for yours?

18 MR. CRAMER: We would -- a half hour.

19 THE COURT: All right.

20 CROSS-EXAMINATION

21 BY MR. CRAMER:

22 Q. Good morning, Dr. Mason.

23 A. Good morning.

24 Q. As you heard me mention, we represent about 40 national  
25 accounts with upwards of approximately two and a half to three

1 million covered lives. And I want to ask you some questions  
2 about the injunctive relief aspects of your opinions in your  
3 declaration.

4 I want to make sure, though, to start off that we're both on  
5 the same page when we refer to the term "national accounts."  
6 You're familiar with the court's decision in *Cigna-Anthem* in  
7 which it found and defined a separate antitrust market for  
8 national accounts?

9 A. No. I'm not familiar with precedent on the legal side of  
10 this matter.

11 Q. Okay.

12 MR. CRAMER: Your Honor, if I may approach.

13 THE COURT: You may. And you don't have to ask either.  
14 You can approach as necessary. Thank you so much.

15 MR. CRAMER: Thank you, Your Honor.

16 Q. In your declaration, you cite in a number of places or at  
17 least several places to this PowerPoint slide -- this PowerPoint  
18 deck from the *Cigna-Anthem* case; correct?

19 A. I seem to recall this. Yes.

20 Q. And this is the PowerPoint for the testimony of a Dr. David  
21 Dranove; is that correct?

22 A. That appears to be correct.

23 Q. And if we look at page 3 of this PowerPoint that you cite in  
24 your declaration, we see the information, the evidence, that  
25 Dr. Dranove considered in his expert testimony, on which the

1 court relied on in *Cigna-Anthem*; correct?

2 A. I see the slide, yes.

3 Q. Any reason to dispute that Dr. Dranove, on whom you relied,  
4 had access to the breadth and depth of evidence when it came to  
5 national accounts in assisting him to determine the market  
6 definition?

7 A. I would have to review what he determined here. I don't  
8 know -- if you'd like to point me to something within the deck,  
9 I'm happy to take a look at it --

10 Q. Okay.

11 A. -- in terms of his determination, but this slide seems to  
12 say he looked at some things.

13 Q. And this is a PowerPoint that you cite in your declaration;  
14 correct?

15 A. Right.

16 Q. And you wrote your declaration and presumably found this  
17 PowerPoint testimony to be sufficiently credible to rely upon;  
18 correct?

19 A. Sure. I found pieces that were clear enough to rely upon.  
20 But a PowerPoint deck, being any PowerPoint deck, doesn't fully  
21 describe the report in this matter. If you're going to ask me  
22 about Dr. Dranove's analysis, it would make more sense to look  
23 at the report and a full explanation. I'm sure he spends  
24 paragraphs deciding -- I'm sorry -- describing what he means by  
25 the bullets on slide 3. But I'll take it on its face for

1 purposes here.

2 Q. Thank you. And turning to page 12 of this PowerPoint, we  
3 see characteristics of national accounts. And Dr. Dranove  
4 explains that these tend to be ASO plans but that they can  
5 include fully insured plans; correct?

6 A. Sure.

7 Q. And we see his ultimate conclusion that commercial health  
8 insurance sold to national accounts is a relevant product  
9 market; correct?

10 A. I'm sorry. Can you restate that quote? I just want to make  
11 sure you read it correctly.

12 Q. We see his conclusion that commercial health insurance sold  
13 to national accounts is a relevant product market.

14 A. Is a relevant product market. Correct.

15 Q. And as we heard from Mr. Burns at the very beginning of your  
16 testimony, the distinction of the market is of critical  
17 importance. Those aren't my words. That was Mr. Burns's words.

18 A. Was that in his introduction before I spoke?

19 Q. Correct.

20 A. Those were his words, I suppose.

21 Q. Do you disagree with them?

22 A. Well, it's my understanding Dr. Dranove's analysis is  
23 undertaking merger analysis. So in a merger analysis, yes, one  
24 critically has to define the market. I'm evaluating a  
25 settlement for which we have a definition given by the extent of

1 the horizontal allocation scheme. But yes, market definition is  
2 certainly important.

3 Q. Okay. And you asked for the support. And as you mentioned,  
4 this was a merger analysis. And we see how Dr. Dranove went  
5 about determining a national account market. First we see  
6 that --

7 THE COURT: Counsel, do you have a position on how, if  
8 in any way, a merger analysis considered by, for example, the  
9 D.C. district court, would differ from an analysis of a  
10 geographic market division scheme and determining and allocating  
11 damages?

12 MR. CRAMER: So, again, my questions go to the  
13 injunctive relief and to the claims made in Dr. Mason's report  
14 that --

15 THE COURT: This is the same question as relates to  
16 injunctive relief.

17 MR. CRAMER: Yes. That the ASO market is,  
18 quote-unquote, more competitive or less price sensitive than the  
19 fully insured market. And I think what we'll see through these  
20 slides --

21 THE COURT: So you would say that a merger analysis and  
22 an analysis that we're engaging in here in this case would be  
23 similar in terms of determining price sensitivity,  
24 competitiveness in the market, matters like that?

25 MR. CRAMER: I think maybe the best explanation, Your

1 Honor, would be a merger tries to look into the future and says  
2 this is where the market is today, let's look into the future  
3 and see the effect this merger will have on the market tomorrow.

4 THE COURT: The effect of a change in the market will  
5 be.

6 MR. CRAMER: And here we have injunctive relief. We  
7 have a market today; and this settlement process is asking you  
8 to decide what will that market be like in the future, will this  
9 injunctive relief change the market, have procompetitive  
10 effects, or won't it?

11 And to undertake that analysis, we submit you start  
12 with what is the market, what characterizes the market, and then  
13 you can understand, I think -- or we can analyze what does the  
14 elimination of the national-best-efforts restraint without the  
15 elimination of the ESAs have on the national account market.

16 THE COURT: You can proceed.

17 MR. CRAMER: Correct.

18 THE COURT: I'm just trying to make sure I understand  
19 what your contention was in terms of bids.

20 MR. CRAMER: And I think a market that has been found  
21 already to be a national accounts market, that analysis, which  
22 is premerger -- right? -- it's what is the relevant market --  
23 would apply equally in a merger context as it would in this  
24 context.

25 THE COURT: All right. Thank you.

1 Q. (Mr. Cramer, continuing:) And in fact, you're familiar with  
2 the concept of SSNIP? We're looking at a hypothetical  
3 monopolist for determining a market, and that applies whether  
4 it's horizontal restraint that's being challenged or whether it  
5 is a prospective merger being challenged; correct?

6 A. I'm not sure that's correct. I've not been asked to perform  
7 a SSNIP analysis in this case. I think that's more of a legal  
8 question with regard to a horizontal allocation scheme and the  
9 difference between that and a horizontal merger.

10 Q. Okay. So the -- just so the Court and everyone else is  
11 clear, you were not asked to define a market or conduct a test  
12 with respect to reasonable interchangeability or price  
13 elasticity?

14 A. Not reasonable sustainability. I also was not asked to  
15 perform a formal test of price elasticity. That test is similar  
16 to the analysis of Dr. Ariel Pakes, who provided a report in  
17 this matter. It is my understanding after discussions with BCBS  
18 licensees that similar data to that used by Dr. Pakes for the  
19 State of Alabama does not exist for every service area, so it is  
20 not clear that that analysis can be performed for every service  
21 area. I would have liked to have done that formally, but we  
22 don't have the data.

23 Q. But you cited some secondary sources -- correct? -- where I  
24 think in your PowerPoint, I saw you maintained that ASOs have  
25 more options and, therefore, lower price sensitivity.



1 A. Generally yes. Yeah.

2 Q. But in this PowerPoint on which you've relied in your  
3 declaration, we see two studies of elasticity of demands, and we  
4 see Dr. Dranove's conclusion that, indeed, actual elasticity is  
5 less than critical elasticity for purposes of defining the  
6 market and, in fact, is quite low; correct?

7 A. Where are you? Slide 16?

8 Q. Slide 16. I'm sorry, Dr. Mason.

9 A. Okay. Having looked at slide 16, can you please repeat your  
10 question?

11 Q. Sure. Well, maybe I'll make an easier question. You do not  
12 offer, as you mentioned, any SSNIP analysis -- you did not  
13 perform any SSNIP analysis or elasticity test that would  
14 contradict or call into question the earlier work cited here by  
15 Dr. Dranove?

16 A. As I testified previously, I did not perform a SSNIP  
17 analysis.

18 I have to say I am confused by one thing because there have  
19 been a number of allegations that my report cites specific  
20 documents that I do not in fact cite or rely upon. And I have  
21 looked through my report here for -- at least looked through the  
22 footnotes to see where I cite Mr. Dranove. I do remember seeing  
23 it in preparing for my analysis, but if I did cite it, I'd  
24 appreciate you pointing out where.

25 Q. Sure. And I'll show you the slides -- one of the actual

1 slides you do cite.

2 A. I might. I just can't find it. And for what purpose. And  
3 I think that might help shape your question --

4 Q. Sure.

5 A. -- understanding for what purpose I might cite this.

6 Q. You cited to Dr. Dranove with respect to whether TPAs were a  
7 substitute or a viable alternative for national accounts. Does  
8 that refresh your recollection?

9 A. No. I don't see the cite in my report. Is this in my  
10 report? Some of these cite -- some of these claims seem to  
11 point to the Burns memorandum, which I did not author. I want  
12 to make sure that's not what you're referring to here before we  
13 go further with this testimony, if you don't mind.

14 Q. No. You could start with footnote 83 of your declaration.

15 A. Thank you. And thank you for clarifying.

16 MR. BURNS: Mr. Cramer, what footnote was that?

17 MR. CRAMER: 83.

18 MR. BURNS: 83.

19 A. 83.

20 (Brief pause)

21 A. Okay. I see that.

22 Q. And you can also look at footnote 30. It's not very clear  
23 there. I'll just read you footnote 30.

24 TPAs provide competition for all but the largest firms.

25 According to the DOJ's expert, David Dranove, TPAs are not

1 strong competitors for national accounts, citing to a 1 percent  
2 presence in this segment as well as noncompete agreements.  
3 Judge Jackson's opinion, pages 82 to 83, lays out evidence for  
4 which TPAs steer clear of national accounts.

5 So there you're not only citing Dr. Dranove -- and I believe  
6 you're citing this slide right here -- but you're also citing  
7 the court's opinion from the *Anthem-Cigna Merger* case; correct?  
8 A. Footnote 30 points to slide 24. You're showing me slide 43.  
9 Is that what's being referred to in footnote 83?

10 Q. I'm sorry. It might be. I'm sorry. You quote the line,  
11 less than 1 percent of major consultants, 1,100 U.S. clients,  
12 are TPAs; correct?

13 A. Where?

14 (Brief pause)

15 Q. I don't have an encyclopedic knowledge of your declaration.  
16 I'm sorry, Dr. Mason. But I will find that 1 percent cite that  
17 you give.

18 I guess maybe to distill all this down, you agree that TPAs  
19 are not strong competitors for national accounts; correct? And  
20 you cite that in your declaration and explain that in your  
21 declaration.

22 A. Just to be specific, my footnote 30 reads: TPAs provide  
23 competition for all but the largest firms. According to the  
24 DOJ's expert, David Dranove, TPAs, quote, are not strong  
25 competitors for national accounts, unquote, citing to a 1

1 percent presence in the segment as well as noncompete  
2 agreements.

3 And that reference points to the Dranove presentation at  
4 slide 24 and Judge Jackson's opinions at pages 82 and 83.

5 Oh, I'm sorry. I follow up: Judge Jackson's opinion, pages  
6 82 and 83, lays out evidence for why TPAs, quote, steer clear,  
7 unquote, of national accounts.

8 Q. So we have a market for national accounts. And we  
9 understand that for national accounts, there are really only  
10 four options, according to the opinion as well as according to  
11 Dr. Dranove; correct?

12 A. Four options?

13 Q. Correct. United, Cigna, Aetna, and the combination of the  
14 Blue defendants.

15 A. I'm saying your only four options for what?

16 Q. For national accounts. I'm sorry.

17 A. For national accounts to do what?

18 Q. For their ASO services or other commercial -- other  
19 commercial insurance products.

20 A. I don't -- I'm not sure where -- is this a question?

21 Q. Yes. You have maintained that national accounts are  
22 different than other ASOs, and you have cited Dr. Dranove and  
23 Judge Jackson's opinion for the fact that these TPAs, which you  
24 explain provide additional outlets for ASOs, aren't available to  
25 national accounts; correct?

1 A. I'd say it slightly differently. I'd say national accounts  
2 are big, and so they typically rely upon a big provider of ASO  
3 services in order to meet their needs. But as far as options  
4 that they have, they can always purchase fully insured from  
5 these same companies, same large companies.

6 Again, it would probably be a large company. Dranove  
7 doesn't say that TPAs aren't active at all with the largest  
8 firms, just that when firms become so large, yes, there's fewer  
9 sources from which they can buy services that meet their needed  
10 scale.

11 Q. And the only market in which Judge Jackson struck down the  
12 proposed merger was in a national accounts market; correct?

13 A. I don't know about what Judge Jackson struck down, so I  
14 really can't say.

15 Q. How many lives are encompassed by national accounts?

16 A. I don't know off the top of my head. Part of that depends  
17 upon how you define a national account. I know we did some  
18 analysis of this, but I don't recall off the top of my head.

19 Q. Do you understand the complaint defines a national account  
20 as greater than 5,000 covered lives?

21 A. Sounds generally correct. I haven't committed the complaint  
22 to memory, for sure.

23 Q. And for those national accounts, some are qualified under  
24 the settlement agreement and some are not; correct?

25 A. I understand there are rules in the settlement agreement

1 that define which national accounts are treated in a certain way  
2 for purposes of the settlement.

3 Q. And is it your understanding that there are approximately 66  
4 million covered lives by national accounts, of which 33 million  
5 are -- receive the right to seek a second Blue bid under the  
6 settlement?

7 A. As I said, I haven't committed those numbers to memory.

8 Q. So you have no idea if the majority of covered lives in this  
9 country for which a Blue provides insurance services are under a  
10 national account?

11 A. The -- the vast majority? I don't know that I've made that  
12 calculation for purposes of this matter.

13 Q. Were you in the courtroom yesterday?

14 A. Yes. I think all but the last 20 or 30 minutes.

15 Q. All right. Did you see the presentation about there being  
16 approximately a hundred million potential claimants out there?

17 A. I heard some numbers like that thrown around.

18 Q. And if 66 million of the hundred million were national  
19 accounts, would that be a majority of all covered lives in a  
20 national account?

21 A. Sixty-six million lives out of a hundred million lives? I  
22 suppose. I'd have to check those numbers before I'd agree.  
23 Those aren't my numbers, so I really can't say.

24 Q. Now, you understand that within the national account market,  
25 the defendants have allocated these customers amongst

1 themselves?

2 A. Are you talking about part of the history leading to this  
3 case or --

4 Q. I'm talking about today, that the defendants have divided up  
5 the territories. And for a national account headquartered in a  
6 particular territory, one Blue defendant and only one Blue  
7 defendant is entitled to bid on that business. Do you  
8 understand that basic premise in this case?

9 A. I think that's generally correct. Again, this is not  
10 something that I specifically looked at.

11 Q. And you're -- do you know any of the history, for example,  
12 that in 1984, there was 110 and then in 1989, there were 75, in  
13 1996, there were 62? Are you familiar with that gradual wave of  
14 consolidation?

15 A. Are those numbers referring to the number of national  
16 accounts?

17 Q. Yeah. Just number of Blue defendants or Blue licensees.

18 A. Okay.

19 Q. Does that sound -- does that comport with your understanding  
20 of the history here of the concentration and consolidation that  
21 has occurred?

22 A. I haven't committed the specific numbers to memory from the  
23 eighties and the long history of the Blues, but I understand  
24 generally there's been consolidation over the time that's  
25 brought us to today.

1 Q. And did you perform an HHI analysis as part of your  
2 declaration to measure market concentration?

3 A. No. I wasn't evaluating merger.

4 Q. You understand that HHI can be used to understand the level  
5 of concentration in any market; correct?

6 A. Sure.

7 Q. And any reason to doubt that -- that the market for national  
8 accounts, as Dr. Dranove illustrates here, is classified as  
9 highly concentrated under an HHI analysis?

10 A. Well, Dr. Dranove concludes what Dr. Dranove concludes for  
11 the purposes of his analysis.

12 Q. And if we look at market share, we see that for the national  
13 accounts, the Blue defendants essentially have the same amount  
14 of shares as all other providers in that market combined;  
15 correct?

16 A. I'm sorry. I'm looking at the page. Could you please  
17 restate that?

18 Q. Sure. According to Dr. Dranove's analysis in the national  
19 account market, we see that the Blue defendants in this case  
20 have approximately half of the market.

21 A. His charts show what they show.

22 Q. Okay. And in your declaration, you explain -- and I believe  
23 you testified earlier that, quote, a market in which a seller  
24 has more market power will lead to a greater ability for that  
25 seller to increase price and, therefore, greater profitability



1 for that seller; correct?

2 A. Sure.

3 Q. And we can agree that the defendant Blues in this case have  
4 used their market power to extract higher prices from national  
5 accounts; correct?

6 A. I think you asked can we use that statement alone to  
7 conclude that these companies extracted higher prices from  
8 national accounts. If that was your question, I would say no,  
9 that's not correct.

10 Q. Are you familiar with --

11 THE COURT: That may be the lawyer for your side's  
12 position in this case, though, if we kept litigating.

13 Q. Are you familiar with the operative complaint in this case?

14 A. Yes.

15 THE COURT: All right. Counsel, I think we're bogging  
16 down a little bit.

17 MR. CRAMER: Okay.

18 THE COURT: I think you're -- I think I just made the  
19 key distinction, what's alleged. But if you want to tie this to  
20 what I'm considering, feel free; but let's not get into a debate  
21 about --

22 MR. CRAMER: Understood, Your Honor. I'm sorry. And  
23 I'll move along.

24 Q. And I guess -- are you familiar, then, with -- and I'll skip  
25 along everything that your clients have alleged and get right to

1 the -- the nub, which is that, currently, your clients seek an  
2 injunction prohibiting the individual Blue plans in the  
3 association from entering into, honoring, and enforcing any  
4 agreements that restrict territories or geographic areas in  
5 which any member may compete.

6 Are you familiar with that request for an injunction?

7 A. You're using the legal terms. I have not committed those to  
8 memory. I understand generally that part of this settlement  
9 will wipe away the horizontal allocation scheme, yes.

10 Q. Well, I'm talking about the -- the injunction in the  
11 complaint. You understand the settlement purports to bless the  
12 continuation of the geographic territorial allocation amongst  
13 the Blue defendants; correct?

14 A. Can you please restate that? I'm sorry. You're jumping  
15 around with the legal language. I'm an economist here. I am  
16 not here to testify to the legal nature of this case, and I'm  
17 happy to follow as best I can.

18 Q. You give an opinion --

19 A. Perhaps it would be helpful if I had some of the language in  
20 front of me to see.

21 Q. Okay. I guess I was -- I put the language up there. I'm  
22 sorry. This is from page 539 of the complaint.

23 (Brief pause)

24 A. Okay. Paragraph 539 says what it says.

25 Q. And that would apply to all national accounts equally and

1 indivisibly; correct?

2 A. I don't see any distinction in paragraph 539 between  
3 national accounts or other accounts, so I would presume the  
4 answer to your question is correct. Again, I don't want to be  
5 seen as making a legal determination here. That's not what I'm  
6 here to do. This is not my specialty, reading legal language  
7 and interpreting it.

8 Q. But you do interpret the effects -- or you purport to  
9 interpret the effects of the injunctive portion of the  
10 settlement in this case; correct?

11 A. I provide an economic interpretation of my reading of the  
12 injunctive provisions that are proposed as part of this  
13 settlement.

14 Q. And those injunctive provisions that are proposed with  
15 respect to the territorial allocation provide some national  
16 accounts with the ability to seek out a second Blue bid, but not  
17 all; correct?

18 A. That's my understanding, yes.

19 Q. And Appendix C to the proposed settlement agreement lists  
20 about 1,038 entities that would have the right to seek a second  
21 Blue bid; correct?

22 A. I remember a list. I'm not sure if that's the list that  
23 have the right to seek a second Blue bid. But yes, I understand  
24 that the largest of those entities has a right to seek a second  
25 Blue bid.

1 Q. But that list includes about 375 entities that already have  
2 the ability to seek a second Blue bid because of some  
3 consolidation yet to be complete amongst the Blue defendants  
4 because there are some pockets in Pennsylvania and California  
5 where a -- where there is what we've referred to as Blue-on-Blue  
6 purported competition; correct?

7 A. I understand that concept generally, yes.

8 Q. Now, the vision of who gets the right to seek a second Blue  
9 bid versus who doesn't, that's not based on size; correct?

10 THE COURT: Folks, I think this is one of the concerns  
11 I had going in. And I wish I had thought about this earlier. I  
12 wish what we'd done is had the proponents of the settlement put  
13 on the board their arguments about second Blue bids, because I  
14 think that's really what you're after in this examination --  
15 right? -- in large part?

16 MR. CRAMER: It's certainly part of it. It is  
17 certainly a significant part of it.

18 THE COURT: Yes. But yet we're a number of minutes  
19 into it and this is the first time we've hit it. I realize  
20 you've tried to lay the groundwork on markets and how they  
21 compare. But to be honest with you, it may be more helpful to  
22 me if we call a time-out, have them present the rationale for  
23 the second Blue bid, and then you can ask him about what they  
24 just said. Wouldn't that make more sense than the shadowboxing  
25 we're doing now?

1 MR. CRAMER: Your Honor, I'm all for efficiency and  
2 productivity.

3 THE COURT: Okay. What say everyone about that?

4 MR. BOIES: Fine with us, Your Honor.

5 MR. HAUSFELD: If we can have a short break to prepare  
6 for the change, that would be appreciated.

7 THE COURT: Well, I think it's time for a short break  
8 anyway, so we'll do that.

9 MR. HAUSFELD: Thank you, Your Honor.

10 THE COURT: But folks, we're running -- we're going to  
11 run short on time if we keep this pace up. I mean, this is -- I  
12 hate to say it, but I felt like two days for a fairness hearing  
13 in this case was more than adequate, reasonable, and fair.  
14 Okay? So we've got to be efficient. And I'm just telling you  
15 if things get -- if you don't hit your major points, that's not  
16 my problem. Okay? Everybody understand that? And I'm not just  
17 addressing the lawyer at the lectern. I think that goes for  
18 everyone.

19 MR. BURNS: Yes, Your Honor.

20 THE COURT: All right. And again, there will be  
21 opportunities to make your points that you think you didn't  
22 flesh out enough today in written form later. I assure you of  
23 that. But what I would suggest to you is it is time to major on  
24 the majors and make the most important things the most important  
25 things. All right?

1 Take a short, ten-minute break and resume after that.

2 MR. BURNS: Thank you, Your Honor.

3 (Recess at 10:57 a.m. until 11:23 a.m.)

4 THE COURT: All right. Before we start with second  
5 Blue bid, let me see a representative from each group up here.

6 MR. RICHIE: Including objectors, Your Honor?

7 THE COURT: Yes. Objectors who care about (b) (2)  
8 versus (b) (3).

9 Here are ten copies of what I have outlined earlier.  
10 Why don't y'all take those and discuss them. Okay? Actually,  
11 give me one back.

12 MR. HAUSFELD: My pleasure.

13 THE COURT: Thank you. Okay.

14 MR. RICHIE: Your Honor --

15 THE COURT: You're not talking about second Blue bid,  
16 so why are you standing there?

17 MR. RICHIE: I have a proposal. It's not just one  
18 proposal --

19 THE COURT: Okay. I like proposals.

20 MR. RICHIE: I'm trying to save time.

21 This is our first chance to talk to Dr. Mason and  
22 potentially our only chance. We haven't deposed him. It is  
23 hard to be very concise with our questions. We haven't been  
24 able to build a foundation for --

25 (The court reporter interrupts for clarification)

1 MR. RICHIE: My microphone was off. My apologies.

2 Your Honor, our proposal on behalf of the objectors who  
3 are going to take Dr. Mason's testimony would be that for all  
4 live witnesses, the hearing is adjourned for us to take -- not  
5 stopped, but held open for us to take their testimony by  
6 deposition and to submit to the Court excerpts that are where  
7 we've majored on the majors.

8 But we've never been able to examine him about any of  
9 his work, about his assumptions, about those things. It would  
10 help us to be able to build that foundation. Some of those may  
11 be dry wells; some things may have really important  
12 consequences. And I can't know, without asking the questions,  
13 what those things are.

14 This is the first time an ASO witness has been on the  
15 stand in this case. And I would like to think I could do an  
16 adequate job in 30 minutes. I'm just not sure that's the case.

17 I understand that counsel for the subscribers object to  
18 that proposal, and I'll -- unless the Court has questions, I'll  
19 yield for them.

20 MR. BOIES: We think this hearing ought to just go  
21 forward, Your Honor. We don't think it ought to be adjourned or  
22 there ought to be any, you know, further delay. We don't think  
23 there's a need for depositions.

24 I frankly don't think it's particularly productive to  
25 ask an economist to interpret paragraphs in the complaint. I

1 think that is not a sensible use of time. I think if they just  
2 focused on the points that they need to make, they can make  
3 their cross-examination in the time period that they have.

4 If there were to be depositions, those depositions  
5 ought to take place today, tonight. We ought to have this over  
6 with, not drag this on for an indefinite period of time.

7 THE COURT: Okay. Let me -- so let me tell you what my  
8 reaction is.

9 MR. RICHIE: Certainly, Your Honor.

10 THE COURT: But I'd need to think about it more. But  
11 the reaction is no one asked for depositions leading up to the  
12 hearing, even though we knew there was a request to have  
13 Dr. Mason here. We -- the agenda that the proponents of the  
14 settlement had worked out last night and provided the Court this  
15 morning allotted a couple of hours for you to do this. And I  
16 thought you told me earlier you didn't need a couple of hours,  
17 you could do it in a shorter period of time. And if what I've  
18 seen so far on the examination of Dr. Mason is what would occur  
19 in the deposition, I'm not sure that would be terribly helpful  
20 for the Court.

21 MR. RICHIE: Your Honor, first of all, a page of  
22 history. We received the right to get testimony from  
23 Dr. Mason --

24 THE COURT: Because I ruled and said you could.

25 MR. RICHIE: Yes. And that order proposed either that



1 we do it by some combination of live or by deposition. We met  
2 and conferred with Mr. Burns, and there wasn't time to organize  
3 a deposition or availability to make that happen. No one is  
4 pointing fingers about that. But we could not anticipate the  
5 number of items that would come up in this case, the time  
6 pressures --

7 THE COURT: There are two things you really want to get  
8 his views on, it seems to me: the whole concept of the second  
9 Blue bid and how it was decided upon; right?

10 MR. RICHIE: That's not specifically my objection, Your  
11 Honor, but --

12 THE COURT: No. There's two things. That's one. And  
13 the other is allocation and how it was decided upon.

14 MR. RICHIE: Yes.

15 THE COURT: Anything else that you would depose or  
16 examine him about in front of me?

17 MR. RICHIE: Allocation goes a long way, Your Honor.  
18 There's a lot of factual issues --

19 THE COURT: Anything else besides those two topics that  
20 you would examine him about in front of me?

21 MR. RICHIE: His general qualifications, his -- Your  
22 Honor, the subject of the hearing --

23 THE COURT: I thought we said earlier there wasn't an  
24 objection to his qualifications. There may be objections to his  
25 opinions and to the extent his qualifications may affect the

1 weight that should be given the opinions.

2 MR. RICHIE: Yes, Your Honor. We don't believe he's  
3 got experience that he can bring to bear on this specific issue,  
4 I think, that's related to allocation. I'm trying to be as  
5 forthright and forthcoming so that no one says I hid anything.

6 The communications that he had with whom is an issue  
7 that we've already been before the Court on. I need to build a  
8 factual record of that. That's not a great use of time today --

9 THE COURT: And we didn't have a court reporter, but  
10 what I said to you was that communications that counsel for the  
11 subscribers had with Dr. Mason after a settlement had been  
12 reached and was being proposed to the Court and that related to  
13 Dr. Mason's testimony in support of approval of the settlement,  
14 there was a common interest and that you were not entitled,  
15 based upon the common-interest privilege that I think everyone  
16 agrees would apply, if it applies -- I said it does apply in  
17 this circumstance and you're not entitled to get to  
18 communications that, for example, subscriber counsel had with  
19 Mr. Burns or with Dr. Mason directly.

20 Is that a fair summary of what the ruling was?

21 MR. RICHIE: Yes, Your Honor. That's a -- that's a  
22 fair summary. Yes.

23 THE COURT: All right. So that's the ruling. So  
24 you're not going to be able to go into any of that.

25 MR. RICHIE: I would like the chance with this witness

1 to lay a factual predicate to support any appeal of that ruling,  
2 Your Honor.

3 THE COURT: What's the factual predicate you need to  
4 support, that there were -- first of all, if there were no  
5 communications, then there's no reason to appeal.

6 MR. RICHIE: Correct.

7 THE COURT: If there were, you can appeal.

8 MR. RICHIE: His reliance, what he relied upon, the  
9 identity of people that were sending things to him, the timing  
10 of those as they relate to his initial engagement as it carries  
11 all the way through his work in this case, which seems to have  
12 moved through several phases.

13 It's not a long examination, Your Honor. I do believe  
14 that --

15 THE COURT: Okay. Look. So we are -- understand this.  
16 Correct me if I'm wrong, and I may be misunderstanding how  
17 experts apply here. His testimony doesn't go to whether or not  
18 allocation was what the Court would have done if the Court was  
19 counsel, what you would have done if you were counsel, or even  
20 what your colleagues on the other side -- for example, the  
21 Blues -- would have done if they were counsel. The question is  
22 was the allocation fair, adequate, and reasonable.

23 We're not -- it's not a definitive point and line that  
24 can be drawn to say this is where the line should have been  
25 drawn. We're dealing with ranges of reasonableness here.

1 MR. RICHIE: Absolutely.

2 THE COURT: So, you know, I think that's one of the  
3 things I think we're losing sight over is, you know, for  
4 example, the expert for the United States in the *Cigna-Anthem*  
5 issue before the D.C. district court may have analyzed this  
6 differently in terms of where the line was drawn, second Blue  
7 bid, whatever.

8 I want to hear argument on why it was unreasonable for  
9 them to do this. So I think that's one of the issues I had is  
10 we put the cart in front of the horse earlier. We didn't  
11 even -- we haven't had the proponents explain allocation and  
12 second Blue bid before y'all started. This is what I said we  
13 were going to do right after the break, and we get into the  
14 firestorm about whether or not we need to take depositions.

15 MR. RICHIE: Your Honor, my only interest is in  
16 obtaining the relevant testimony the most efficient way.

17 THE COURT: Let's do this. I don't know. I don't know  
18 what's in dispute here at this point. I know you have some  
19 disputes and some arguments. I don't know how they mirror with  
20 what they're going to present in the hearing. So let's table  
21 this discussion. Let's do what I asked us to do.

22 MR. RICHIE: Certainly.

23 THE COURT: Let's put up -- let's get going on the  
24 second Blue bid, let's talk about the allocation, and then you  
25 guys might have a little bit of opportunity to narrow down what

1 you really want to ask about --

2 MR. RICHIE: Certainly, Your Honor.

3 THE COURT: -- and then we'll have a better context of  
4 whether or not it makes sense to do what you're asking to do.

5 I'm inclined against it, but I've not made a decision  
6 about that. But my view is, look, we've had 11 months since  
7 preliminary approval. We've had over a year since the  
8 settlement notice went out; right? I mean -- I'm sorry. Not  
9 over 11 months. Over -- when did -- when did the notice go out?

10 MS. JONES: End of March, Your Honor.

11 THE COURT: I'm sorry?

12 MS. JONES: End of March.

13 MR. BOIES: End of March, Your Honor.

14 THE COURT: End of March. So we're now, you know, six  
15 and a half months or so since notice went out.

16 MR. RICHIE: Your Honor, only --

17 THE COURT: Everybody has been educated on what this  
18 settlement was. Everybody knew this was the hearing that was  
19 going to kind of set things in place. It seems to me if there  
20 were depositions necessary, the parties and objectors would have  
21 come forward and said that before today.

22 MR. RICHIE: Yes, Your Honor. I'm happy to share the  
23 history of requesting testimony from Dr. Mason, but his first  
24 report is dated September 3rd of this year. It was not  
25 submitted with any of the settlement -- we've been more than

1 diligent in trying to get his testimony, so --

2 THE COURT: All right. Very well. I understand what  
3 you're saying.

4 MR. HAUSFELD: Morning, Your Honor.

5 THE COURT: Be brief. Cut to the chase.

6 MR. HAUSFELD: I will. In addressing the issue of  
7 injunctive relief, we had two overriding concerns, one, for the  
8 rules themselves and, two, to do -- to remove the restraints --

9 THE COURT: Pull that microphone a little closer to  
10 you.

11 MR. HAUSFELD: -- to remove the restraints that were in  
12 the market and to introduce the inclusion of procompetitive  
13 effects that would open competition in the market.

14 With regard to the tests under Rule 23 for purposes of  
15 judging the adequacy, reasonableness, and fairness of a  
16 settlement, in the context of Rule 23, the advisory committee  
17 notes and the rules themselves state "equitable" means there  
18 must be a reasonable explanation for different treatment under  
19 the terms of the agreement as a whole. The advisory committee  
20 notes further state that matters of concern can include whether  
21 the apportionment of relief among class members takes  
22 appropriate account of differences among their claims.

23 And in the *Radcliffe* case, which we cited in our brief,  
24 the court upheld settlement relief that had different forms for  
25 different class members because the proposed relief was

1 adequately supported by considerations behind those  
2 distinctions. That was the approach that we took.

3 And, Your Honor, if I may turn to slide 31 --

4 THE COURT: Is this a different set of slides than I  
5 was provided yesterday?

6 MR. HAUSFELD: No.

7 THE COURT: Okay. Because it's not -- my pages are not  
8 matching up with your pages.

9 MR. HAUSFELD: That's usually the condition that I get  
10 them in.

11 MS. BOJEDLA: Your Honor, I can give you a set.

12 THE COURT: Please. Thank you, Swathi.

13 MS. BOJEDLA: We have a lot of slides.

14 THE COURT: I understand. I don't, though. I need the  
15 ones we're looking at. Thank you.

16 All right. You may proceed.

17 MR. HAUSFELD: We looked at the market and we said  
18 where and how can we introduce competition not just in one form  
19 but in multiple forms so that there would be greater choice and  
20 opportunity for consumers and the ability of the Blues to  
21 respond to that choice by competing not only with others in the  
22 market but with themselves as well.

23 Ultimately, we came to a tiered system. And if we look  
24 at slide 31 -- and I'd like to start kind of at the bottom of  
25 the tier, and that is those ASOs with under 5,000, you know,

1 employees. The settlement provides for opportunities for  
2 competition beyond the second Blue bid itself.

3 Most importantly, note the settlement allows for  
4 unlimited green bids by eliminating the national-best-efforts  
5 rule. And a green bid really is merely a Blue bid under a  
6 different color. And it's different than *Topco* because here  
7 there clearly were Blues that had green businesses of  
8 significant size and were operating in competition with Blues in  
9 areas outside their ESAs.

10 But on top of that --

11 THE COURT: Did you ever think you'd be standing before  
12 a court trying to distinguish *Topco*?

13 MR. HAUSFELD: No.

14 THE COURT: Go ahead.

15 MR. HAUSFELD: And counsel for the national accounts  
16 raised the *Anthem* case. And the *Anthem* case offered another  
17 insight into the elimination of the national-best-efforts rules.  
18 One of the factors inhibiting the merger raised by the  
19 Department of Justice was the fact that Anthem would have  
20 acquired Cigna businesses; but under the Blues'  
21 national-best-efforts rules, it would have had to have converted  
22 those Cigna plans into Blue plans, which, under the  
23 national-best-efforts rules, would have reduced the ability of  
24 those firms to compete.

25 THE COURT: I understand how green business injects



1 additional competition potentially into the market. So let's  
2 move along to the second Blue bid, the relief that it provides,  
3 and what your thinking was in terms of eligibility requirements  
4 for the second Blue bid, why more groups did not get the benefit  
5 of a second Blue bid.

6 MR. HAUSFELD: Again, what counsel for the national  
7 accounts demonstrated by referencing the *Anthem* opinion was the  
8 fact that the Court, in that merger case, certified or  
9 recognized the existence of national accounts with 5,000  
10 employees or over.

11 We understood that, and we took account of that  
12 because --

13 THE COURT: So you're looking at this fairly  
14 significant piece of litigation litigating issues -- or at least  
15 markets similar to what you're looking at. You notice that the  
16 court and the experts in that case identified this market of  
17 5,000 or more. Take it from there.

18 MR. HAUSFELD: Right. And below that number, below  
19 that threshold, if we look at national account slide 42 that I  
20 just put up --

21 THE COURT: Which I don't have.

22 MR. HAUSFELD: -- there are regional or local carriers  
23 below the 5,000 level that provide competitive opportunities for  
24 ASOs at that level in addition to the Blues.

25 THE COURT: That's from the exhibit that was being used

1 with the witness?

2 MR. HAUSFELD: Yes, Your Honor.

3 THE COURT: I'm sorry. I misunderstood. Go ahead.

4 MR. HAUSFELD: And we also took note of the fact that  
5 TPAs, which operate heavily in the market for ASO accounts below  
6 the national account level, are not strong competitors for the  
7 national accounts with 5,000 employees or more.

8 And the third chart that was referenced indicated that  
9 there was a further distinction of national accounts of 5,000 or  
10 more employees geographically dispersed.

11 We took those factors into account in creating the  
12 second Blue bid. And the second Blue bid covers one-third of  
13 all national accounts and over one-half of all accounts with  
14 5,000 employees or more up to at least 33 million lives.

15 So we concluded that if we could open that market up to  
16 competitive bids, that would provide a greater pressure on price  
17 and on services and on innovation and on product offerings that  
18 otherwise did not exist in the market.

19 But we added a bit of a twist to it. And the twist was  
20 it wasn't just another Blue plan could make a bid in addition to  
21 the Blue plan in which the national account was headquartered,  
22 we said the second Blue bid could be directed by the national  
23 account itself so that the Blue system doesn't determine who  
24 gets the Blue bid, but the national account itself can request  
25 its choice of who it wants to receive a Blue bid from.

1           And it goes further with regard to the second Blue bid  
2 that --

3           THE COURT: And I take one of the things about that  
4 proposal is it makes you more comfortable, since you've accused  
5 the Blues of agreeing not to pursue certain business --

6           MR. HAUSFELD: Exactly.

7           THE COURT: -- that it takes that decision-making out  
8 of their hands and allows -- it allows members of this  
9 particular class to designate who they want to do -- seek the  
10 opportunity to do business with.

11          MR. HAUSFELD: Yes.

12          THE COURT: Okay.

13          MR. HAUSFELD: And the agreement goes further. And if  
14 the national account's choice of a second Blue bid declines,  
15 then they have the right to put up another request for a bid  
16 until there are at least two competitive Blue bids.

17           What we found, if I've got the right slide up -- I  
18 think I do -- is in doing that, we took this to our -- to  
19 Dr. Rubinfeld, who is a world-renowned economist, and said what  
20 will this do if we're able to achieve it. And he told us in no  
21 uncertain terms not only does that benefit that portion of the  
22 market which -- in which the largest ASOs covering insured lives  
23 reside -- is most likely -- and most likely to ask for and  
24 benefit from a second Blue bid --

25          THE COURT: And I think you've addressed this, but

1 let's just be very clear on the record about why you cut it off  
2 at 5,000 employees and why you added the additional template of  
3 geographic dispersion.

4 MR. HAUSFELD: Because it was rationally based in the  
5 criteria in the market.

6 THE COURT: Meaning?

7 MR. HAUSFELD: Meaning --

8 THE COURT: That was a conclusion.

9 MR. HAUSFELD: Meaning the 5,000 was recognized by the  
10 court in *Anthem* as being the threshold for the existence of a  
11 new market --

12 THE COURT: The parties viewed that as a solid  
13 benchmark.

14 MR. HAUSFELD: Yes.

15 THE COURT: Okay.

16 MR. HAUSFELD: -- as well as the dispersion criteria,  
17 which, again, was in the chart that the market itself -- that  
18 the Court took cognizance of -- that the market itself  
19 reflected.

20 THE COURT: All right.

21 MR. HAUSFELD: And then in doing that, we understood  
22 that we would be benefiting not only that segment of the market  
23 by giving them an additional Blue bid which they direct but,  
24 additionally, that there would be increased competition  
25 throughout the market because of the flow of pricing information

1 at that high level all the way down the market.

2 Also, Your Honor, that the qualified national account  
3 list, if you meet the eligibility criteria, is refreshed every  
4 two years. So that is both flexible and dynamic in terms of its  
5 fluidity. It accepts companies that move up, that grow, and  
6 removes those that contract so that we're covering effectively  
7 the same body in the aggregate, you know, of covered lives.

8 That has never been achieved before. And we felt that,  
9 in and of itself, establishes a benefit not only to the national  
10 account market that they otherwise did not have nor could direct  
11 as well as the entirety of the ASO market as well as the market  
12 generally, including fully funded, in terms of the introduction  
13 of competition at the very top level, reducing prices,  
14 increasing innovation and product services availability.

15 THE COURT: All right.

16 MR. HAUSFELD: All of which boils down --

17 THE COURT: And this is where you land the plane;  
18 right?

19 MR. HAUSFELD: This is where I land the plane. On the  
20 next -- the two bullets at the bottom, the dispersion criteria  
21 is objective. We went to an outside source and said, okay, who  
22 makes up the national accounts in the largest single category?  
23 And that was employers because those are the companies that have  
24 the greatest number of covered lives as well as the greatest  
25 dispersion, making them true national accounts.

1           And then we looked at whether or not this was rational.  
2 And there was, as you said, a rational benchmark upon which to  
3 base those distinctions. And that's it in short.

4           THE COURT: All right. That was succinct. I  
5 appreciate that.

6           Please, everyone, use that as a high-quality example of  
7 what you should do when you step to the microphone.

8           MR. HAUSFELD: And, Your Honor, as --

9           THE COURT: And then you're going to say something  
10 else.

11           MR. HAUSFELD: Only if you want to hear -- you gave out  
12 those sheets about how --

13           THE COURT: Yes. Let's hold off on that.

14           MR. HAUSFELD: Okay.

15           THE COURT: I do appreciate you being willing to  
16 address that, but I want to keep focused on apples, so let's  
17 stay focused on apples.

18           MR. HAUSFELD: Thank you, Your Honor.

19           THE COURT: Thank you.

20           MR. SLATER: Your Honor, could I have 30 seconds?

21           THE COURT: You may.

22           MR. SLATER: Thank you. I really will be very brief.

23           With regard to the 5,000 members in the national  
24 account, we have not objected to that. With regard to the  
25 dispersion issue, we briefed that, Your Honor. We'll stand on

1 our briefs. Same thing with regard to the Taft-Hartley and the  
2 church plans.

3 THE COURT: Yes. And we haven't addressed that. I'm  
4 going to give you a chance to address that.

5 MR. SLATER: I think the answer is going to be we're  
6 going to stand on our briefs. We've --

7 THE COURT: And that would be a perfect answer too, but  
8 I'm not going to pretermite any discussion you would like to give  
9 me on that.

10 MR. SLATER: Thank you, Your Honor.

11 THE COURT: Thank you.

12 All right. Who's got -- so how about the other set of  
13 objectors? What response to that?

14 MR. RICHIE: Your Honor, that's not my objection.  
15 That's my coverage of my objection. I was just --

16 THE COURT: Okay. That's fine. So do we need to do  
17 any further examination of this witness about that, then?

18 MR. CRAMER: I have additional questions for the  
19 witness based on the presentation.

20 THE COURT: What are those?

21 MR. CRAMER: Well, we're looking -- sorry.

22 THE COURT: Come to the microphone.

23 MR. CRAMER: A few --

24 THE COURT: I just wonder what this witness can help me  
25 figure out based upon what Mr. Hausfeld has just told us was the

1 rationale behind the settlement, not whether or not we draw the  
2 line somewhere else, but whether the line drawn is unreasonable.  
3 All right? So --

4 MR. CRAMER: So on that question, it is probably  
5 unlikely the witness can assist. I think where the witness  
6 could assist is on the question of does this relief provide  
7 anything of substance in a national account market going  
8 forward.

9 Now, I have --

10 THE COURT: Are you -- is it your contention that  
11 second Blue bids that were not otherwise available and green  
12 competition that was not otherwise permitted would have no  
13 effect on competition, or are you just saying, we're not sure  
14 it's going to have the effect on competition that the class  
15 advocates?

16 MR. CRAMER: So let me answer those two pieces because  
17 they're different. On the 663 national accounts that are  
18 entitled to seek out a second Blue bid, theoretically, that  
19 should improve competition. Now, there's buried in the  
20 agreement a \$25 local service and support fee that this Court is  
21 being asked to set, which we think is a horizontal price fix.

22 But let's, you know, go past the mechanics. Yes, if  
23 663 national accounts had the right to receive or seek a second  
24 Blue bid, then for those 663 entities, that should be a plus,  
25 assuming that they can seek a second Blue bid that is not



1 precluded by the mechanics buried in the settlement agreement.  
2 Agree there.

3           With respect to green competition -- and I apologize  
4 for not majoring in the majors. What I was trying to set up  
5 with the earlier testimony was that the national account market  
6 is distinct. And for green competition to have an effect in the  
7 national accounts market, it must satisfy those criteria that  
8 Dr. Dranove explained. And the combination, we believe, of the  
9 local-best-efforts rule and the continued prohibition of Blue --

10           THE COURT: Isn't that answered by the fact that it's  
11 not just any random Blue whose green business would be  
12 attractive to a national account, but particular green  
13 businesses? For example, if Anthem has a green business, a  
14 major giant, that's going to make a significant difference and  
15 there may be national accounts that want to deal with Anthem  
16 green business. There may be people who don't qualify for a  
17 second Blue bid who would be more than happy to go to Anthem's  
18 green business.

19           MR. CRAMER: And we think that if Anthem could enter  
20 into the green business for national accounts, that that would  
21 obviously be a plus. We do not believe, though --

22           THE COURT: Your argument is that this is set up where  
23 Anthem doesn't have that opportunity as much as others.

24           MR. CRAMER: Well, for example, Anthem's area is  
25 protected from Blue-on-Blue competition because of the

1 geographic dispersion.

2 THE COURT: Yes.

3 MR. CRAMER: Second, for Anthem, as we heard earlier  
4 about the premium equivalent testimony -- we heard Mr. Burns  
5 talk about how premium equivalents were used for  
6 local-best-efforts restraint. So if I'm Anthem and I can only  
7 receive, you know, 20 percent of my revenue from green accounts  
8 and I own a third of the United States, well, my ability to  
9 provide green competition to a national account that has covered  
10 lives in Anthem territories is limited.

11 THE COURT: Based on the local best efforts.

12 MR. CRAMER: That is correct. And that aggregation of  
13 restraints --

14 THE COURT: So, Mr. Hausfeld, do you want to address  
15 that issue? And I think I ought to give the Blues the  
16 opportunity to address the issue as well.

17 MR. HAUSFELD: The local-best-efforts rules would not  
18 preclude that because it only accounts for revenue derived from  
19 the locality in which both the plan and the ASO are in. So if  
20 there are revenues outside --

21 THE COURT: It's not the entire service area when it  
22 comes to Anthem?

23 MR. HAUSFELD: Correct.

24 THE COURT: I'm sorry?

25 MR. HAUSFELD: Yes.

1 THE COURT: So that's what I thought, but I -- let's  
2 see if the Blues agree with that.

3 MR. ZOTT: Could you repeat the question, Your Honor?  
4 I'm sorry, Your Honor. I was --

5 THE COURT: Go ahead, Mr. Hausfeld. Would you please  
6 restate it for us.

7 MR. HAUSFELD: The local-best-efforts rule requires  
8 that the standards be met by the operation of the ASO and the  
9 Blue plan in that state and that state alone.

10 THE COURT: Not the entire service area, but just the  
11 state.

12 MR. ZOTT: Correct. That's exactly right.

13 THE COURT: Because Anthem's service area obviously  
14 branches across different states, but LBE only -- as modified,  
15 as I understand it, only applies on a state-by-state basis?

16 MR. ZOTT: It's measured at the state level under the  
17 modification. Correct.

18 THE COURT: All right. So that means that Anthem would  
19 be freed up to do more green business outside -- depending upon  
20 the state.

21 MR. HAUSFELD: And it would be free under its green  
22 business to operate anywhere.

23 THE COURT: Well, and that's the point is not only --  
24 and so one question is -- and maybe somebody could answer this  
25 question for me, because I've seen these arguments about, well,

1 if your local best efforts is restricting green business, then  
2 green business does -- there's not an incentive for a Blue to  
3 develop a green business within its service area. And I asked  
4 earlier if those are really -- obviously, they are technically  
5 separate actors if they're different entities, but what would be  
6 the incentive just on a -- not in terms of a Section 1  
7 conspiracy, but just as far as that decision-making center to  
8 say, you know what we need to do, we need to compete with  
9 ourselves?

10 MR. HAUSFELD: There was a time, I believe, where  
11 Anthem was, you know, very active as a green business because  
12 any health insurer does not necessarily cover the full range of  
13 products or the bundle of services that are available. So yes,  
14 there's room, you know, for having both. You've got to measure  
15 that, possibly, you know, by business opportunity.

16 THE COURT: But it seems to me that the one argument  
17 against what the Court just hypothesized would be this. If  
18 Anthem is unhappy with restrictions placed upon it by the  
19 association and how it goes about its business and is unhappy  
20 with having to do things like focus in on strengthening the  
21 Blue -- the Blue mark, then there may be some incentive to do  
22 some of the business through the green where they can take some  
23 shortcuts or alleyways or what have you.

24 But that's the point, isn't it, that the local best  
25 efforts encourages each Blue to focus on the mark? It seems to

1 me, at least, there's an argument -- I'm not saying that this is  
2 true. I'm not saying I'm finding this as a finding of fact or a  
3 conclusion of law. But we just all agreed yesterday my job here  
4 is not to address the issues on the merits but just to see if  
5 they're clearly illegal. I don't think we can say it's clearly  
6 illegal for a Blue to decide -- and the Blue -- and each Blue to  
7 be required to say, we want you to focus on the mark and we want  
8 you to strengthen the mark. That's -- that's a --

9 Yes, Mr. Laytin.

10 MR. LAYTIN: I'd be happy to take that from  
11 Mr. Hausfeld.

12 THE COURT: I think you're going to sing a clearer song  
13 with better harmony than I did. But go ahead.

14 MR. LAYTIN: Well, not necessarily than you did, but as  
15 someone representing the Blues.

16 Three points. The first is, you know, there's an adage  
17 in the Blue system that if you know one Blue plan, you know one  
18 Blue plan. And so obviously, there's a diversity of views in  
19 different types of plans on points like this.

20 But the second point is common -- is the point you  
21 raised, which is it is incredibly important that there is a  
22 nationally strong network of Blue plans, and local best efforts  
23 ensures that folks invest in the local service areas. If you  
24 don't do that, we don't have a nationwide system.

25 But then the third point is --

1 THE COURT: And that's a benefit to --

2 MR. LAYTIN: That is it a benefit to --

3 THE COURT: -- to the insureds.

4 MR. LAYTIN: -- consumers and, we think, providers too  
5 and et cetera.

6 And then the third point is, yeah, within -- you know,  
7 once you accept those first two premises, there's a lot to be  
8 said for the logic that you don't want to compete against  
9 yourselves. Now, you know, Toyota has Toyota and Lexus. And so  
10 there's obviously different views on segmentation, et cetera,  
11 and that's where you get to the diversity of views among the  
12 system. But I think those first two points are really  
13 controlling as it relates to the procompetitive benefits. And  
14 then obviously, as you said, the fact that especially under this  
15 go-forward system, any Blue plan can compete on a green basis  
16 outside their service area.

17 MR. ZOTT: Your Honor, could I just add, if it's  
18 appropriate, one point --

19 THE COURT: Yes.

20 MR. ZOTT: -- if it would be helpful, which is the  
21 other issue is we've litigated for nine years in a very  
22 adversarial setting and through nine years of discovery, expert  
23 reports, some of the best experts in the country. No plaintiff  
24 has been able to assess or quantify any harm flowing from LBE.  
25 So the mere fact that we've litigated for nine years and there's

1 no ability even to advocate for any harm flowing from it is  
2 powerful evidence that that rule -- unlike the NBE rule, which  
3 has been challenged and there's experts, et cetera -- that that  
4 rule does not have any effect.

5 THE COURT: Well, if there had been that type of  
6 evidence in this case or at least indication of harm in this  
7 case, I'd say Mr. Boies would have been in your grill about it.

8 MR. ZOTT: Yeah. And that's the reason it's still in  
9 the agreement is because we've litigated it and that's been the  
10 end result.

11 And then the only other thing I'd say is our briefs  
12 pointed out that their -- that the LBE -- excuse me -- that the  
13 second Blue bid is effective for Anthem. And we pointed to the  
14 fact that there are at least 20 qualified national accounts that  
15 would qualify --

16 THE COURT: So Anthem is sitting there on the second  
17 Blue bid and, for whatever reason, it's not the one invited to  
18 the dance.

19 MR. ZOTT: Right.

20 THE COURT: It can still, outside of its state, for a  
21 second -- when a second Blue bid is at issue, it becomes aware  
22 of that, directly or indirectly, however; it can approach  
23 that insured, potential insured or self-insured, whatever the  
24 case may be, that organization, and say we would like to earn  
25 your business.

1 MR. ZOTT: Correct.

2 THE COURT: And we're going to compete against the two  
3 Blue bids that you're getting.

4 MR. ZOTT: That's right.

5 THE COURT: Without restriction; right?

6 MR. ZOTT: On a green -- absolutely.

7 THE COURT: In terms of outside their service area.

8 MR. ZOTT: On a green business. That's right.

9 THE COURT: So that's at least two additional bids that  
10 ASO gets that they wouldn't have gotten presettlement.

11 MR. ZOTT: Right. And the only point --

12 THE COURT: And not to mention there may be others  
13 besides Anthem that would like to take a swing at some green  
14 business too.

15 MR. ZOTT: Right. And I was just responding to the  
16 argument that because of the size of Anthem's service area,  
17 there won't be that many qualified -- Anthem accounts that would  
18 qualify as qualified national accounts and meet the dispersion  
19 criteria. And the point there is we put 20 in the brief. I  
20 just want the Court to understand there's at least 150 more. So  
21 there's at least 170 Anthem accounts that are qualified national  
22 accounts and are entitled to a second Blue bid. And that's a  
23 very material relief in our view with respect to Anthem as well  
24 as with respect to the rest of the class for the reasons  
25 discussed yesterday.



1 THE COURT: All right.

2 MR. HAUSFELD: And we are aligned with both the Court  
3 and the Blues' description that the reasonably tailored local  
4 best efforts rules designed to encourage local investment are  
5 historically and traditionally virtually universally upheld.

6 THE COURT: All right. Back to our objector friends.

7 MR. CRAMER: If I may be heard on three points, Your  
8 Honor.

9 THE COURT: You may. Do we need Dr. Mason sitting  
10 there any further?

11 MR. CRAMER: I think he can sit down.

12 THE COURT: You may -- don't leave.

13 MR. RICHIE: Your Honor --

14 THE COURT: Don't leave.

15 MR. CRAMER: Correct. I think --

16 THE COURT: He just doesn't need the front row seat  
17 right now. He can go drink some water.

18 MR. RICHIE: We have allocation testimony later, but  
19 nothing further right now.

20 MR. CRAMER: Your Honor, my first point, the remark was  
21 made just now -- it's been made at other times -- that there was  
22 nine years of discovery, there was terabytes of information.  
23 But we've also heard that that discovery was focused on the  
24 damages class that had been alleged, which was fully --

25 THE COURT: Where did you hear that?

1 MR. CRAMER: -- fully insured individuals and the less  
2 than 200 group employees.

3 THE COURT: All right. I understand what you're  
4 saying.

5 MR. CRAMER: And the danger when you have a settlement  
6 agreement that's filed 28 minutes after a complaint that, for  
7 the first time, alleges a subclass is that the factual record  
8 wasn't created. And so with respect to local-best-efforts  
9 restraint, for fully insured individuals who work within a  
10 single state, which means the only competitor that would come in  
11 for green -- right? -- would be an out-of-state Blue defendant,  
12 that makes perfect sense.

13 For a national account, though, that's dispersed  
14 throughout the United States -- you know, if we look at -- turn  
15 the document viewer back on, the effects on a national account  
16 may be very different such that if I have lives throughout the  
17 United States and they fall in these Anthem territories and  
18 Anthem wants to provide me a green bid -- right? -- say I'm --  
19 my home state of Tennessee. Say I'm located there and Anthem  
20 wants to come in to a FedEx that's located in Tennessee and  
21 provide a green bid. Well, it has to make sure that that green  
22 product that it provides to FedEx through the entire nation  
23 doesn't mess up its local best efforts restraints in California  
24 and New York and Georgia, Ohio, and everywhere else.

25 THE COURT: How would it?

1 MR. CRAMER: And that just has never been tested.

2 THE COURT: No. How would it?

3 MR. CRAMER: So if a -- let's take the hypothetical of  
4 a -- well, let's not take a hypothetical. Let's look at our  
5 client, Kroeger, here. We see it has stores throughout the  
6 United States. Well, if Anthem wants to be a strong green  
7 competitor to national accounts, well, then it's going to have  
8 to offer products -- the green product; right? -- in California.  
9 It's going to have to offer this nationwide. And if it's so  
10 successful in offering that green product, it's going to run  
11 askew of the 80 percent limit, 80/20 percent limit.

12 This is not about --

13 THE COURT: You started talking off talking about FedEx  
14 in Memphis or a Memphis location --

15 MR. CRAMER: Correct.

16 THE COURT: -- and then you switched.

17 MR. CRAMER: I did. I did. And that's because --

18 THE COURT: Okay. Because that wasn't going to work  
19 for you, was it?

20 MR. CRAMER: It would work.

21 THE COURT: Okay. Explain how that would work.

22 MR. CRAMER: So if FedEx has employees throughout the  
23 United States and Anthem wants to offer FedEx a green product  
24 because it's located in Tennessee, then Anthem has to make sure  
25 that, okay, how many lives do you have in California? Because I

1 can't ensure that many lives to the point where it becomes 20  
2 percent of my revenue. And I can't do that in New York. And I  
3 can't do that in Ohio. I can't do that in all these states  
4 where I'm restrained.

5 Now, at the end of the day, maybe in practicality, this  
6 doesn't plan out as we theorize. But it's a pretty big leap to  
7 say that a class that was in existence for 28 minutes before the  
8 settlement agreement is filed and for which there had not been a  
9 factual record, that we can just say --

10 THE COURT: Well --

11 MR. CRAMER: -- the national-best-efforts restraint is  
12 blessed.

13 THE COURT: That's not the realities of how litigation  
14 works, though -- right? -- nor the realities of what occurred  
15 here. What occurred here is there was prefiling discovery,  
16 formal and informal. Am I right?

17 MR. BURNS: Yes, Your Honor. Significant.

18 THE COURT: There was retention of counsel who was  
19 looking at potentially pursuing a class long before that. There  
20 was the availability of years of litigation handed to counsel by  
21 other counsel -- here it is; go through it; here's expert  
22 reports; here's discovery; oh, here's all the smoking guns from  
23 the Blues' stuff that we -- Judge Putnam worked through in  
24 discovery; here's access to whatever you need to assess this --  
25 and the idea being if we are going to get finality and repose on

1 a new business structure for the Blues, why not give the benefit  
2 of that to these other groups.

3 So the question becomes is it really a benefit to the  
4 other groups, not whether there was 28 minutes between filing of  
5 the complaint and filing of a settlement, because we all know,  
6 realitywise, much, much work went into that before the filing.

7 MR. CRAMER: And I don't want to -- fair.

8 THE COURT: And I just -- you know, that's the kind of  
9 thing that just isn't really helpful to me to hear arguments  
10 like that.

11 MR. CRAMER: And I'm sorry. Maybe the better -- a  
12 better articulation of what I should have said is --

13 THE COURT: You're free to argue and explain to me why  
14 you don't think there's a sufficient record at this point.

15 MR. CRAMER: And -- and I --

16 THE COURT: But that has nothing to do with when the  
17 complaint was filed and when the settlement was announced.

18 MR. CRAMER: Correct. And it was in response to this,  
19 you know, nine years of discovery when people weren't looking at  
20 the effects of the national -- of the local-best-efforts rule on  
21 national accounts as a distinct market.

22 THE COURT: But there was a Venn diagram there.

23 MR. CRAMER: Absolutely.

24 THE COURT: And it seems to me there's a pretty  
25 substantial amount of information within the Venn of the

1 diagram.

2 MR. CRAMER: Correct. But what was missing from that  
3 Venn diagram or missing from the overlap that we would expect is  
4 what Dr. Mason says in paragraph 30 of his declaration, which is  
5 there were no data sources of information available to him to do  
6 an overcharge analysis. And if you can't do an overcharge  
7 analysis of the damages that national accounts receive, then you  
8 can't weigh that against the future benefits. We're looking to  
9 the future here. And if we don't know what the overcharge is  
10 for national accounts in the current market and then run that  
11 same modeling with the injunctive relief that's being  
12 proposed --

13 THE COURT: Are you helping Mr. Richie a little bit  
14 there on the allocation?

15 MR. CRAMER: No. This is injunctive relief; right?  
16 Because I'm concerned --

17 THE COURT: But when you're talking about overcharges,  
18 I think that goes to monetary damages too; right?

19 MR. CRAMER: Absolutely. But my concern is -- you  
20 know, we've opted out of the damages class. And so my concern  
21 is about the injunctive relief and how you evaluate it. And so  
22 that's, you know --

23 THE COURT: Well, but so how do -- what aspect of the  
24 injunctive relief in the (b)(2) area are you specifically  
25 saying, this should be different? You're making a lot of

1 arguments about, okay, they didn't take account of this, they  
2 maybe didn't have enough account to do that, they perhaps rushed  
3 this. What specifically in the (b)(2) relief are you saying  
4 should be different?

5 MR. CRAMER: The (b)(2) relief, I guess what I'm saying  
6 is should be congruent with the (b)(2) release. And what I mean  
7 by that is we've disaggregated the output restriction that was  
8 national best efforts and the territorial restriction, which was  
9 the Blue-on-Blue ESA allocation of customers. And if the  
10 (b)(2) -- if we understand the (b)(2) now to say we have  
11 resolved the output restriction, we have provided -- we've  
12 struck down the national-best-efforts restraint, then I don't  
13 have a complaint about the (b)(2). But if the (b)(2) relief  
14 dips down into the (b)(3) -- if the (b)(2) release dips down  
15 into the (b)(3) relief --

16 THE COURT: Did you read my little vignette?

17 MR. CRAMER: I did, Your Honor. And --

18 THE COURT: What did you think?

19 MR. CRAMER: I think it -- well, let me -- if I may  
20 resolve -- reserve comment to that so that I can confer with --

21 THE COURT: Well, but I thought you were just referring  
22 to that. You just said if the (b)(2) relief crowds out some of  
23 the (b)(3) injunctive relief we might otherwise be able to seek,  
24 we have a concern with that.

25 MR. CRAMER: Correct.

1 THE COURT: And I just -- and what I've just provided  
2 you is, I thought, a swing at trying to make sure that doesn't  
3 occur, individualized to your client. But anyway...

4 MR. CRAMER: Correct. And I can -- divisible  
5 injunctive relief may include the right to pursue in litigation  
6 a second Blue bid. In our way of thinking, if the basis for a  
7 second Blue bid is that the ESAs are unlawful, then that  
8 unlawfulness applies whether it's two or five or 30. You know,  
9 an agreement to allocate customers -- you know, we would -- we  
10 don't think the case law would make a distinction.

11 THE COURT: But look, we went through this --

12 MR. CRAMER: And I'm not -- that's why I --

13 THE COURT: Hold on. I don't like to be interrupted,  
14 particularly in my own courtroom.

15 We went through this yesterday. The tail does not wag  
16 the dog. If they're -- I understand what you're saying is if  
17 the ESAs are illegal. I've got to decide if they're clearly  
18 illegal. And if they're not, then assuming other things are in  
19 place, I should approve this settlement, assuming the other  
20 requirements of 23(e) are met; right?

21 MR. CRAMER: Correct.

22 THE COURT: Disagree with that?

23 MR. CRAMER: No.

24 THE COURT: Okay. If I do approve the settlement and  
25 it provides for what at least the parties tell me is historic



1 structural relief, you don't have the right to travel with your  
2 client to a different court and undermine that relief, whether  
3 your theory is the ESAs are illegal or that the sun rises in the  
4 west. It doesn't matter what your theory is. You don't get to  
5 go back and undermine structural relief approved by a court of  
6 proper jurisdiction ruling on a Rule 23 class and providing --  
7 and approving a Rule 23 class settlement. It's as simple as  
8 that.

9 Now, beyond that, you guys keep wanting me to -- and  
10 you keep wanting to make arguments out, well, where does that  
11 get carved? At the joint? Mid-thigh? Look, I've told you the  
12 law is pretty clear. You cannot undermine the (b)(2) relief.

13 Now, again, you can go and litigate whether ESAs are  
14 illegal in your individual case and you can seek individualized  
15 relief if a court determines that they are. That's that.  
16 That's easy, it seems to me. And I don't understand -- I think  
17 we are overly complicating this. All right?

18 MR. CRAMER: Thank you, Your Honor.

19 THE COURT: All right.

20 Mr. Boies, you're the one who seemed to me not to be  
21 singing with the rest of the proponents yesterday on this issue.  
22 Maybe I misperceive. Maybe you just don't sing well.

23 MR. BOIES: I think I'm basically singing the same  
24 theme, although the melody may shift a little bit.

25 If I could just spend 60 seconds and clear up a couple

1 of things. First, while we started off representing only a much  
2 narrower class, we did discovery that related to the entire  
3 market. Our complaint --

4 THE COURT: And you shared that with Mr. Burns.

5 MR. BOIES: And we shared that with Mr. Burns. And  
6 we --

7 THE COURT: And, Mr. Burns, did you have adequate time  
8 to work your way through all that discovery before you took a  
9 position in this case?

10 MR. BURNS: Absolutely, Your Honor. And I can speak to  
11 that if you'd like.

12 THE COURT: Eventually you will.

13 MR. BURNS: Okay.

14 MR. BOIES: And in our complaint, we distinguished the  
15 ASOs from the fully insured. And so we had to do discovery  
16 about what those different markets were and how the competitive  
17 restraints affected each of those markets. So this is something  
18 that we have been -- in terms of the discovery, in terms of the  
19 underlying facts as opposed to the allegations, we've been  
20 looking at for a long time.

21 THE COURT: And I think there was at least an  
22 understanding that the Blues even had that you were reserving  
23 your right all along to broaden the class definition and you  
24 yourself pursue -- it may have been in a subclass.

25 MR. BOIES: Yes.

1 THE COURT: Because of lack of common characteristics,  
2 it may have required a subclass. But I think what Judge Putnam  
3 supervised was broad-ranging discovery across all markets not  
4 only because you needed to distinguish the effects in one market  
5 that you weren't necessarily at that point trying to represent  
6 and contrast it with the lack of competition in the market you  
7 were -- and you acknowledged, I think, that there may be more  
8 competition in the ASO market, but your position was there was  
9 less competition in the subscriber market.

10 MR. BOIES: Exactly right, Your Honor.

11 THE COURT: And so one of the things you would have  
12 focused on is, all right, so why is there more competition in  
13 the ASO market, what are the effects of that competition, and  
14 what can we learn from that to educate us about what arguments  
15 or remedies we should pursue in the subscriber market.

16 MR. BOIES: Exactly right, Your Honor. And that  
17 discovery went directly to the way we approached the second Blue  
18 bid issue. As I said yesterday, getting 31 million covered  
19 lives was a compromise. If we could have gotten 62, we would  
20 have gotten 62. If they could have gotten none, they would have  
21 gotten none. This was a compromise.

22 THE COURT: Mr. Hausfeld kind of told us about the  
23 objective benchmarks that were used to reach that compromise.

24 MR. BOIES: Exactly. And now, once we knew we were  
25 going to get some substantial second Blue bids, we had to be --

1 THE COURT: And I say objective. That doesn't  
2 necessarily mean they're perfect.

3 MR. BOIES: No. Absolutely not.

4 THE COURT: It doesn't even necessarily mean that if we  
5 put them to the test of litigation, they'd turn out to be  
6 accurate.

7 MR. BOIES: Right.

8 THE COURT: But they were something that you were aware  
9 that the United States -- a United States District Court and  
10 other actors in the markets, in similar markets, had ended upon  
11 through the litigation process, not even a settlement process.

12 MR. BOIES: Right. And we looked at it from the  
13 standpoint of what we thought was reasonable. People can  
14 disagree with us.

15 THE COURT: Yes.

16 MR. BOIES: And sometimes the defendants disagreed with  
17 us a lot. But this was something in which we thought a lot  
18 about it. We analyzed the data. We came to a conclusion that  
19 we thought was the right conclusion and that we're now urging  
20 the Court was at least a reasonable conclusion.

21 And I think it's important to remember that once we had  
22 a certain number of second Blue bids that we were going to be  
23 able to get, we had to decide how do we use that to maximize  
24 competition, what's going to have the greatest effect. And as  
25 Professor Rubinfeld said, if we can have a significant effect on

1 that many customers, it's going to permeate the rest of the  
2 market. It's going to help the health insurance market  
3 generally and particularly all ASOs.

4 And so we picked size and we picked dispersion because  
5 we thought those would result in the second Blue bid going to  
6 places where it would have the greatest effect on competition.  
7 We also thought it would have the greatest effect on actually  
8 getting a second Blue bid. Remember, we can't force them to  
9 bid. All we can do is remove the restraints that keep them from  
10 bidding. And so what we wanted to do was make these accounts  
11 that were going to get a second Blue bid attractive to the  
12 Blues.

13 We also wanted them to be the most useful to  
14 the customers.

15 THE COURT: If we were in junior high school --

16 MR. BOIES: Yes.

17 THE COURT: -- you get to be the one who invites them  
18 to the dance, not sit at home and wait to be invited.

19 MR. BOIES: Right. And you get to determine whether  
20 they are underage.

21 THE COURT: Now, that doesn't mean they have to go to  
22 the dance with you.

23 MR. BOIES: Right. Right. And as my -- and the parent  
24 gets to decide whether it's an acceptable date or not. And  
25 hopefully that is whether it's reasonable, not whether that's

1 the person that they would necessarily pick for you.

2 But I think there's one more point, Your Honor, because  
3 Anthem was talked about in terms of green competition.

4 THE COURT: Hasn't Anthem given us some exciting  
5 moments in this case?

6 MR. BOIES: It has. I can remember their attack on the  
7 mediation privilege, Your Honor.

8 The -- but Anthem is a huge company. I just -- you  
9 know, while counsel was talking, I went over to the Blues and I  
10 asked what Anthem's revenues were. And I understand they're  
11 \$120 billion a year. Now, if that is right, 20 percent of that  
12 is \$24 billion just in their service area that can be green  
13 competition. If their service area is, as counsel said, a third  
14 of the country, that means they can have green competition, even  
15 if it's evenly spread throughout the country, of \$72 billion.  
16 And that's just one company. That is the kind of impact  
17 eliminating the restraints on green competition can have.

18 So is it -- is it perfect? Have we dismantled the Blue  
19 system? No, we haven't. But that's not a hundred percent clear  
20 that that would be in our clients' interests. What we have done  
21 is we have eliminated the restraints in ways that would  
22 massively improve competition.

23 THE COURT: Are you telling me that there were points  
24 in which Mr. Zott and Laytin were arguing before the Court about  
25 the advantages of the Blue system and you sat over at your table

1 and said, you know, they may have a point there?

2 MR. BOIES: Well, as Your Honor recalls, during the  
3 economics day, I acknowledged that there were certain aspects of  
4 a Blue system --

5 THE COURT: That were very favorable to their insureds.

6 MR. BOIES: Exactly. And that didn't mean that we  
7 didn't think there were serious competition problems, but we  
8 think we've gone a long way towards making this industry more  
9 competitive.

10 THE COURT: All right. Mr. Hausfeld, unless you're  
11 going to add something more substantial than that, I think we're  
12 ready to move to allocation.

13 MR. HAUSFELD: I'm fine with that. I was only going to  
14 ask if Your Honor wanted to direct any questions with regard to  
15 your proposal.

16 THE COURT: I thought we'd hold off on the proposal  
17 until we get allocation. Because as soon as we get allocation  
18 done, I think Dr. Mason is free to go. Right?

19 MR. HAUSFELD: Yes.

20 THE COURT: I just didn't want him to be sitting in the  
21 corner of the room during this whole argument.

22 MR. HAUSFELD: Thank you, Your Honor.

23 THE COURT: All right. Well, let's -- who's doing  
24 allocation for the proponents of the settlement, explaining  
25 that?

1 MR. BOIES: Mr. Burns and I are.

2 THE COURT: All right. Let's set the target up so the  
3 subscribers can take aim at it -- I'm sorry -- the objectors can  
4 take aim at it.

5 In case you were wondering, if you were ordered lunch,  
6 it will be a good dinner.

7 MR. BURNS: Well, Your Honor, if you'll indulge me, I  
8 think I am going to take a couple of minutes to talk about my  
9 firm's involvement in this case and what we did, because I think  
10 it --

11 THE COURT: And that probably makes sense since I  
12 pretermitted your discussion of that a moment ago. So tell  
13 me -- just tell me how you got in the case, why you think you've  
14 adequately represented the class, why you think you had  
15 sufficient time, information, and attention to detail to reach a  
16 settlement and advocate a settlement.

17 MR. BURNS: Absolutely, Your Honor.

18 So, Your Honor, a little background. Until 2015, I was  
19 a partner at Susman Godfrey. And in that year, one of my other  
20 partners and I formed our own firm. Since that time we've I  
21 think grown to about 30 lawyers, an equivalent number of staff.  
22 I've done much the same thing I've done throughout my career,  
23 which is representing class actions.

24 THE COURT: And employed Judge Coogler's daughter, as I  
25 recall.



1 MR. BURNS: That's right, Your Honor. And hope to get  
2 her back, so -- I hear she's doing transaction --

3 THE COURT: I shouldn't mention that in front of all  
4 these other firms because they may make a dash to find her  
5 resume.

6 MR. BURNS: Yeah. I don't need the competition. But  
7 in any event, she was great.

8 My point is since 2015, I've been doing much the same  
9 thing since I've done throughout my career. I've served as lead  
10 counsel in both MDL and other class actions in large commercial  
11 cases.

12 I was approached in August of 2019 by Mr. Hausfeld and  
13 Mr. Boies to come into this case. And it was apparent, given  
14 where the case was at that point and the number of years that  
15 had passed to that point that that was a clear-the-decks kind of  
16 case for my firm, for large portions of my firm; and it was  
17 because I viewed it as important then, I view it as important  
18 now, and I wanted to devote the resources that were necessary.

19 I'm going to summarize some of those resources for you,  
20 Your Honor. We jumped in fully and as quickly as possible.  
21 During the last two years in my firm, we have had roughly 21  
22 different timekeepers who have worked on this case, including  
23 five partners with significant experience in antitrust matters  
24 and other complex commercial cases.

25 For a stretch of about a year from August of 2019

1 through July of 2020, when the final settlement agreement was  
2 actually signed, I devoted roughly 50 percent of my personal  
3 time to this case, to the exclusion of other cases I'm involved  
4 in and other new matters that were coming in. That was the  
5 workload we were facing, but it was something that we were  
6 prepared for and something that he -- we put the resources into.

7 Over that same period, we've expended nearly \$2  
8 million, largely on expert fees, working closely with our  
9 experts to make sure we understand all the issues. A relatively  
10 small proportion of that was spent on allocation itself. Much  
11 of it was to do with the case as a whole and the many issues  
12 that are involved in the case.

13 From August 2019 through the signing of the settlement  
14 agreement, we attended every mediation. I think that both  
15 parties -- or all parties in this matter will tell you that not  
16 only did we attend, but that we took a very active role in that  
17 mediation on behalf of the subclass we sought to represent and  
18 that the result of our efforts is embodied in many aspects and  
19 many provisions of that settlement agreement.

20 I will tell you, Your Honor, I'm very proud of the work  
21 I did in this case. I'm very proud of the outcome, because I  
22 think it has effected real change. And it's wonderful to be a  
23 part of that and to see that.

24 And I'll also tell you -- the Court will know I have a  
25 15-month-old son. And I'm going to tell him one day about this

1 case and how important it was to our system and to our market  
2 and the efficacy of our laws, largely because I'm going to need  
3 to explain why I was taking calls from Mr. Hausfeld and Mr. Nehs  
4 during his actual birth.

5 But all joking aside, Your Honor --

6 THE COURT: There is no *Johnson* factor that addresses  
7 that.

8 MR. BURNS: There really isn't.

9 But I will tell you with some discretion -- I mean,  
10 literally, I am standing next to my wife in the delivery room  
11 and my phone starts buzzing. I look down, and it's Michael  
12 Hausfeld. And I said, I'm going to wait on this one. And he  
13 was gracious about it, but --

14 THE COURT: But if it had been Nehs or --

15 MR. BURNS: If it had been Nehs, I probably would have  
16 taken it. So, you know, the moral of this long story, Your  
17 Honor, I don't think anyone can accuse us of not putting the  
18 resources we needed to in this case. And despite the complexity  
19 of the case and despite its longevity and despite the issues, I  
20 think that we brought the right team to bear, we brought the  
21 right experts to bear, and we did everything we could to make  
22 sure that we represented the subclass effectively.

23 Allocation, from the beginning, has been one of the key  
24 focuses, main focuses of the work I've done in this case. I  
25 would have gotten into this with Dr. Mason had time permitted,

1 but we engaged Dr. Mason and his shop in September of 2019,  
2 roughly. And one of the first things we started working on on a  
3 parallel track with the other issues in the case was how do we  
4 look at this settlement fund and what is going to be fair and  
5 appropriate under the circumstances.

6 Dr. Mason and his team advised me every step of the  
7 way. We spent months developing analyses that yielded various  
8 ranges of potential allocation. I was armed with those  
9 analyses, worked closely with them to develop them, and they  
10 formed the basis of my negotiating posture as we went into a  
11 mediation with the subscribers.

12 As the Court is well aware -- and there was a separate  
13 declaration from him in this case -- Ken Feinberg mediated the  
14 allocation dispute between the parties. And it truly was a  
15 dispute. This was a dispute that stretched over a period of at  
16 least three or four or five months. And I will tell you -- I  
17 will tell you the parties were pretty far apart at the beginning  
18 and that it was only through multiple discussions, formal  
19 mediation, and back-channel communications with the mediator,  
20 Mr. Feinberg, that we were able to ultimately resolve it. This  
21 was very much at arm's length, as Mr. Feinberg represents in his  
22 declaration.

23 And at the end of the day, we were able to settle on an  
24 allocation that I think, under the circumstances and as  
25 Dr. Mason has opined on, was fair, adequate, and reasonable in

1 the case, 6.5 percent. The ranges, as you'll see from the  
2 submissions that myself and Mr. Hausfeld presented to the Court,  
3 falls in the middle. I think that when we originally -- or at  
4 one point communicated our ranges with Mr. Feinberg of  
5 somewhere, on the ASO side, of 7 to 16 percent. I think on the  
6 subscriber side it was more like, you know, 2 to 8, somewhere  
7 around in there. We largely, you know, got to a place where --  
8 that was something like the middle between those positions.

9 Now, what I think cannot fairly be disputed -- and we  
10 went through this this morning with Dr. Mason on direct -- is  
11 that Dr. Mason conducted multiple financial analyses. Only one  
12 of them has been substantively challenged in this case by the  
13 self-funded objectors; and that on a basis that, from an  
14 economic perspective, makes no sense whatsoever to an antitrust  
15 economist. It defies the utility of what he was trying to do,  
16 and it would force him to add numbers in and create numbers that  
17 he just doesn't want to do and he doesn't think would be useful  
18 for any antitrust economist.

19 Dr. Mason did what you would expect an economist to do  
20 in this case. He looked at the markets. He looked at their  
21 differences, their characteristics. He will tell you -- and he  
22 will testify to this -- that any economic analysis that did not  
23 take those into account would just not be reliable. You just  
24 couldn't conduct it.

25 Then he went and did four specific financial analyses,

1 all of which revealed different ranges of appropriate  
2 settlements. On the high end, he calculated about 10.7 percent.  
3 Most of his ranges fall below the actual 6.5 percent allocation  
4 that we agreed to in this case. And he looked at those. He  
5 looked at the totality of the circumstances of the case. He  
6 looked at the differences between the markets and he said, look,  
7 in my expert opinion -- I've looked at settlements before, I've  
8 looked at allocations -- as he testified this morning, he's done  
9 it about ten times -- under these circumstances, this allocation  
10 is perfectly reasonable and does a good job -- that may be my  
11 words -- but ends up with a good result for the self-funded  
12 class.

13 THE COURT: All right. So I'm going to back you up --

14 MR. BURNS: Certainly.

15 THE COURT: -- and make sure I understand the process  
16 of the settlement more so than what an expert tells me about a  
17 reasonable range. To the extent you're not violating the  
18 mediation privilege, walk me through what the parties and  
19 mediator did and what all went into the mediation.

20 MR. BURNS: Absolutely, Your Honor.

21 So probably over a course of two to three months after  
22 I first became involved in the case, we started, on the ASO  
23 side, looking very carefully at these allocation issues in the  
24 context of an agreement on the ultimate settlement fund in the  
25 case. On the other side, the subscribers were doing the same

1 thing. The lead experts on both sides were Dr. Pakes for the  
2 subscribers and Dr. Mason for the ASO subclass.

3 During that process, we had at least one or two phone  
4 conversations -- and actually, I'm getting this a little bit out  
5 of sequence. Our goal during that initial period was to come to  
6 some view of where the allocations should land. We then engaged  
7 Mr. Feinberg to conduct a mediation on the issue. And at that  
8 formal mediation, we presented our views. At that point, we  
9 were pretty far apart.

10 THE COURT: So usually you hire a mediator for two  
11 reasons. One is you can't get it done on your own.

12 MR. BURNS: Right.

13 THE COURT: And two, because you want to make sure  
14 there's a neutral supervising the process so there's not  
15 questions raised about untoward things. Both reasons apply  
16 here?

17 MR. BURNS: Both reasons apply, Your Honor. At some  
18 point -- and this was an oral communication, so I don't have a  
19 date. But when I -- at some point, I spoke with Mr. Hausfeld  
20 for that exact purpose of exchanging some initial view. And,  
21 you know, my recollection is I came in and said, Michael, we're  
22 probably somewhere north of 10 percent; you know, I would think  
23 a 15 percent allocation may be reasonable in this case. I knew  
24 that was relatively high in terms of where we were at.

25 He came in and said, you know, look, I think it's, you

1 know, zero to two. I'm deliberately putting some ambiguity --

2 THE COURT: You were pretty far apart.

3 MR. BURNS: We were pretty far apart. He then  
4 suggested -- and this came from Michael -- hey, why don't we get  
5 someone involved to see if we can actually hammer a deal on this  
6 after we've had more time to work through some of this analysis.  
7 He suggested Mr. Feinberg. I've worked with Mr. Feinberg in a  
8 number of cases before myself and have a view on his abilities  
9 and efficacy, and I readily agreed.

10 THE COURT: I take it that's a favorable view.

11 MR. BURNS: Yes. Very favorable. I'm in the middle of  
12 a mediation, actually, now with Mr. Feinberg, but I find him  
13 very effective.

14 THE COURT: And how hands-on was he?

15 MR. BURNS: Very. Very. The way -- and no different  
16 in this case. I probably had about two, maybe three, hour-long  
17 sessions with Mr. Feinberg individually before we got to the  
18 mediation discussing our side, what our views were and what our  
19 views were on allocation. I assume that Mr. Hausfeld had the  
20 same.

21 And then once we actually engaged in the  
22 negotiations -- and Your Honor will probably appreciate this  
23 too -- Mr. Feinberg stayed involved. So we were not able to  
24 resolve it on the first day when we actually met, but  
25 Mr. Feinberg stayed involved until the end. And that involved



1 multiple conversations and trading back and forth different  
2 offers and counters.

3 THE COURT: All right.

4 MR. BURNS: So -- so after those -- that initial  
5 presentation of views, scheduling Mr. Feinberg --

6 THE COURT: He didn't make a mediator's proposal. He  
7 just --

8 MR. BURNS: He did not. He did not.

9 THE COURT: Okay. This is just a -- he supervised  
10 negotiations that landed upon a parties' agreement.

11 MR. BURNS: That's right. And my recollection is, you  
12 know, this process took three to four months and there were  
13 multiple counters over that period, and we got to a place that  
14 we were close enough where we could close it.

15 THE COURT: Okay.

16 MR. BURNS: So that's generally the nature. I  
17 obviously don't want to get too much into those discussions, but  
18 that's generally the nature. And I think Mr. Feinberg has  
19 spoken about it in his declaration as well as in terms of the  
20 process. So that ultimately resolved the allocation issue. We  
21 recognized that that was one piece in terms of the overall  
22 settlement that needed to be taken care of; but at the same  
23 time, we were working towards the goal of finalizing the  
24 settlement agreement.

25 And Your Honor will recall that beginning in

1 probably -- we signed the term sheet -- I think it was finally  
2 executed in December of 2019 -- and began work immediately  
3 trying to work towards a final agreement. The pandemic slowed  
4 us down initially; but around about April or May of 2020, a  
5 small group amongst counsel really got together to push this  
6 matter forward.

7           And on the plaintiffs' side, that group was myself,  
8 Mr. Boies, and Mr. Hausfeld primarily, with some other people  
9 coming in from time to time. On the defense side, it was  
10 primarily Mr. Zott, Mr. Nehs, Mr. Laytin, and Mr. Holmstead.  
11 And, you know, at various points, I felt like I was embedded --  
12 I think we all did -- with each other. I mean, my days -- and  
13 these were pandemic days. So everyone will recall this. So I  
14 would wake up in the morning about six a.m. and have my first  
15 phone call with Michael. About seven, it was a call with  
16 Mr. Laytin or Mr. Nehs. We were on Zooms that often spread  
17 hours. And usually those days concluded sometime in the  
18 evening, eight or nine o'clock calls to try to work through  
19 particular issues.

20           Along the way, Mr. Gentle was intimately involved in  
21 every step, trying to move us forward, trying to put pressure on  
22 us, keep deadlines moving. It was an exhausting process but  
23 ultimately a fruitful one. And I think, you know, that's the  
24 view of all the parties here today.

25           So, Your Honor, that's my basic presentation on why the

1 allocation is reasonable in this case. I think we've heard from  
2 Dr. Mason. We have expert testimony on that fact.

3 I'll touch briefly on the objection from the  
4 self-funded objectors. You know, I give a lot of leeway to  
5 quality lawyers, and we do have quality lawyers on the other  
6 side. And obviously, many of these things that I have just  
7 spoken to they were not privy to and could not very well  
8 appreciate from the outside looking in, but that is the full  
9 story.

10 I began talking to ASOs and their counsel really  
11 beginning in November or December of last year about this  
12 settlement. And so when you hear today about the Burns  
13 memorandum that Dr. Mason was talking about, that was a memo  
14 that I drafted and communicated to the self-funded objectors'  
15 counsel largely to explain to them the process we had gone  
16 through and why we had reached that decision. We spent hours  
17 and hours and hours with self-funded objectors and other lawyers  
18 and other ASOs around the country, trying to be as open as  
19 possible about what we had done and why we viewed the allocation  
20 and other issues in the case that were resolved by the  
21 settlement as reasonable.

22 Focusing on the objection, the principal attack on  
23 Dr. Mason's reasonableness opinion really focuses on this gross  
24 revenue analysis. As the Court heard this morning, this is one  
25 of four analyses. It actually yielded the smallest number,

1 allocation percentage, of any of the analyses. And while  
2 Dr. Mason, as an economist, says there is utility to going  
3 through this process -- and I can understand and appreciate  
4 that -- as a lawyer trying to cut to the chase, I would say,  
5 Your Honor, if you want to, ignore that 1.7 percent and look at  
6 the other three analyses that yield percentages that are right  
7 around and inform the 6.5 percent.

8 I don't want to get caught on stuff that takes us down  
9 too many rabbit holes, but in essence, that's the type of  
10 journey that the self-funded objectors are inviting this Court  
11 and the parties to go down. They have attacked in dozens of  
12 pages the analysis around gross revenue, which was the least  
13 robust, the simplest analysis that Dr. Mason engaged in. And  
14 for the reasons he's testified to this morning, his approach as  
15 an economist was perfectly appropriate. But the result is what  
16 it is, and I think he viewed it and he testified that he viewed  
17 it with the appropriate attention that an economist would.

18 So at the end of the day, most of the objection is  
19 focused on this one element of a multi-pronged analysis. And,  
20 you know, it's hard to fault an expert economist's approach to  
21 this case that encompassed many more and many more thoughtful  
22 analyses.

23 As to the other three analyses that Dr. Mason  
24 performed, the self-funded objectors' own experts don't quibble  
25 with a net revenue approach. They don't quibble with the

1 optimal gains approach, the third approach that Dr. Mason  
2 proposed. And as to the fourth approach, I think their own  
3 background and experience really didn't allow them to appreciate  
4 what Dr. Mason was doing there.

5           So the other approaches stand. I don't think they're  
6 fairly challenged. And I think that ultimately Dr. Mason's  
7 opinion rests on them, as well as his consideration of the other  
8 market characteristics and distinctions that define the markets  
9 in this case.

10           And if there is one principal failing amongst the work  
11 that the objectors and their experts have done, it's a failure  
12 to understand and appreciate those critical distinctions between  
13 the markets. You cannot, in a case like this, just take the  
14 fully insureds and the ASOs and say, hey, let's just divide this  
15 baby. It's close enough to equal, and therefore, the allocation  
16 should have been 50/50 or 60/40. On the one hand, I would love  
17 that to be the case for the subclass, but it just doesn't match  
18 reality and doesn't match, you know, my responsibility to the  
19 facts to say that.

20           What Dr. Mason testified to and described in more  
21 detail in his report is that because of the unique  
22 characteristics of these markets -- primarily their price  
23 sensitivities, the profitability differences between the  
24 markets -- you would expect -- an expert economist would expect  
25 that the fully insured market would bear much more significant

1 overcharges than the ASO or self-funded market. And that's just  
2 a matter of economic principle that I don't think is fairly  
3 challenged in this case.

4 Unless the Court has further questions for me --

5 THE COURT: I do not at this point. I may later.

6 MR. BURNS: -- I would like to pass it to Mr. Boies.  
7 Certainly, Your Honor.

8 THE COURT: Mr. Richie.

9 MR. BURNS: I think Mr. Boies may have --

10 THE COURT: I'm sorry. Mr. Boies.

11 MR. BOIES: Your Honor, I'll be very brief. I might  
12 begin, though, just with an analysis of why ASOs were not  
13 included in our complaint to start with.

14 As I think the Court knows, we spent a considerable  
15 amount of time analyzing this industry before we brought the  
16 complaint. And one of the things that we concluded was that a  
17 claim on behalf of ASOs was going to be much more difficult to  
18 make than a claim on behalf of the fully insureds. The ASOs had  
19 more competition. It was a more competitive market. The ASOs  
20 generally had greater bargaining power. They were larger  
21 organizations, and they had greater bargaining power.

22 And even if you assumed that you were able to establish  
23 the same level of liability, the damages were considerably less.  
24 The ASO business was less profitable. There was a lower level  
25 of what we perceived as an overcharge. And a lot of the

1 payments that were made by ASOs for health care, because they  
2 were self-insured, went to providers as opposed to going to the  
3 Blues. And as the Court is aware, under the antitrust laws,  
4 because of direct purchaser provisions, it's very problematic to  
5 try to recover damages for amounts that you have paid out to  
6 persons other than the defendant that you're -- that you are  
7 suing.

8           Now, when it came to the allocation issue, all of those  
9 things were important, the fact that it was more competitive,  
10 they had more bargaining power, they were less profitable, there  
11 was lower overcharge, there were legal issues in terms of direct  
12 purchaser principles. All of those were important. And in  
13 addition to that, there was a shorter time period that they were  
14 entitled to recover damages for. The fully insured went all the  
15 way back to 2008. The self-funded began no earlier than 2015.  
16 It could be -- it could even have been more recent than that.

17           So for all of those reasons, we began with a  
18 proposition that the amount of damages that should have been  
19 allocated to the ASOs was relatively small. They were going to  
20 be beneficiaries of the injunctive relief, as everybody was in  
21 the industry. But in terms of the damages, it was very, very  
22 hard to really calculate any damages for the ASOs from our  
23 perspective.

24           The way we went at it was that first --

25           THE COURT: I take it these are all concerns you shared

1 with Mr. Burns during the allocation discussions?

2 MR. BOIES: They're all concerns that we shared and I  
3 will say shared emphatically with Mr. Burns because while we  
4 were happy to have him and the ASOs in and we were very  
5 committed to the injunctive relief that we thought would benefit  
6 everybody, in terms of actually allocating a portion of the  
7 damages, we thought that they were entitled to either nothing or  
8 a very, very small amount.

9 We also noted that the ASOs were getting the benefit of  
10 the second Blue bid. That was not something that was going to  
11 the fully insured. That was something that was only going to  
12 the ASOs. Everybody benefited from the general injunctive  
13 relief, but the ASOs had the advantage of the second Blue bid.

14 So we pointed all those things out to him. And he  
15 had --

16 THE COURT: And that's a good point to make is when  
17 we've been talking about divisible injunctive relief,  
18 individualized injunctive relief in this case, that rests solely  
19 in the ASO class.

20 MR. BOIES: Exactly.

21 THE COURT: There's no divisible injunctive relief for  
22 anybody in the class you're representing.

23 MR. BOIES: Exactly, Your Honor. And --

24 THE COURT: And the concern would be -- your concern  
25 would be not allowing any divisible injunctive relief to affect



1 the structure you've negotiated with the Blues.

2 MR. BOIES: Exactly. That is exactly what our concern  
3 was because our --

4 THE COURT: And the other point I would ask about is  
5 the inclusion of the ASOs benefited your class because that made  
6 it more likely for the Blues to agree to resolve this case,  
7 because they wanted something out in repose with the idea that  
8 there may be opt-outs. But they didn't want to settle with your  
9 client and turn right around and get a complaint from Mr. Burns.

10 MR. BOIES: Exactly right. And what we wanted to do  
11 was to come up with the best overall settlement that we could  
12 and then to allocate it in the fairest way we could.

13 And incidentally, I would never say to this Court that  
14 it's 6.5 percent precisely. I don't know what the exact  
15 percentage is. What I know is that we came to the best  
16 percentage that we could all agree on that -- I believe strongly  
17 that it's reasonable, it's fair --

18 THE COURT: And there were times during the allocation  
19 negotiations and mediation you weren't sure you were going to be  
20 able to agree.

21 MR. BOIES: That's right. I mean, there were times  
22 when we thought we were going to have to have an arbitration  
23 about it or have some nonnegotiated dispute resolution. And  
24 there were even times --

25 THE COURT: Or it could have derailed the settlement

1 altogether.

2 MR. BOIES: It could have derailed the settlement,  
3 although I think we were both committed --

4 THE COURT: To not letting that happen.

5 MR. BOIES: -- to not letting that happen.

6 THE COURT: But theoretically --

7 MR. BOIES: Theoretically, it could have.

8 THE COURT: -- if you don't reach an agreement and  
9 nobody agrees to an alternative dispute resolution --

10 MR. BOIES: Right.

11 THE COURT: -- then you couldn't, in good conscience,  
12 come before here and advocate an incomplete settlement.

13 MR. BOIES: We would not have been able to do that,  
14 Your Honor, although before I did that, I would have come to the  
15 Court and said please intervene.

16 THE COURT: I may or may not have.

17 MR. BOIES: The --

18 THE COURT: I probably would have said if Mr. Feinberg  
19 can't get this done, what makes you think I can.

20 MR. BOIES: I mean, and I've got to -- I've got to say  
21 we've given a lot of justified praise to all the other people  
22 that have helped, but I think Mr. Feinberg also deserves  
23 considerable credit. He spent a lot of time on this. He is a  
24 very forceful individual. He -- I'm sure he was very forceful  
25 with Mr. Burns; I know he was very forceful with us. While he

1 never gave a mediator's proposal, he did push us into a range  
2 and made very clear to both sides --

3 THE COURT: There was an invisible hand operating?

4 MR. BOIES: It was a heavy hand. If you've ever met  
5 Mr. Feinberg --

6 THE COURT: I was trying to borrow an economics  
7 principle.

8 MR. BOIES: He's a very emphatic person and was -- and  
9 was very critical to getting this done.

10 But before we got to Mr. Feinberg, we each got experts.  
11 Each got good experts. They did an analysis. They came in, and  
12 we were, you know, several times apart.

13 Now, none of the experts, even in the beginning, were  
14 anywhere where the objectors are, anywhere close to where the  
15 objectors are. But it might have been between 2 and 16 percent.  
16 And -- and then we began to negotiate. We began to analyze.  
17 They pointed out some things about our expert work. We pointed  
18 out some things about their expert work. And we gradually  
19 reached -- you know, moved towards the center.

20 And I think that -- I think -- while I would never say  
21 that this is the exactly right result -- and if it were just up  
22 to me, I think it would have been a little bit lower -- what I  
23 am confident of is that this is a fair and reasonable result and  
24 it is the result of arm's-length negotiations and aided by a  
25 very effective mediator.

1 THE COURT: All right. Thank you.

2 MR. BURNS: Your Honor, may I just add one thing  
3 briefly?

4 THE COURT: Yes.

5 MR. BURNS: Okay. And I would be remiss if I actually  
6 didn't acknowledge and, for the Court, introduce David Benck,  
7 the general counsel of Hibbett Sports, the class representative  
8 in this case, Your Honor.

9 THE COURT: Well, David needs no introduction to the  
10 Court, but you're welcome to introduce him to everyone else.

11 MR. BURNS: Yes. I don't want to belabor this, but,  
12 Your Honor, I've spent my entire career representing classes in  
13 disputes. There hasn't been a year when I didn't. I have never  
14 had as active and committed class representative as I had in  
15 Hibbett Sports and Mr. Benck. And I say that without hyperbole.  
16 David Benck was there every step of the way. More than that,  
17 was digging through discovery, was trying to advise on what the  
18 mind-set of an ASO would be. This is a person that devoted  
19 significant time and effort to this case.

20 And, you know, it's fair to note that during this case,  
21 the Eleventh Circuit came down with an opinion that said, you  
22 know, folks that are in the shoes of class representatives  
23 aren't entitled to incentive awards. That didn't deter David.  
24 I don't think he even went into it with that expectation. But  
25 he worked very, very hard every step of the way to make sure

1 that the ASO interests were adequately represented. I wanted to  
2 thank him for that publicly and certainly call it to the Court's  
3 attention.

4 THE COURT: And you've represented classes with reps  
5 who are laypeople and --

6 MR. BURNS: Absolutely. And businesses.

7 THE COURT: -- frontline workers and --

8 MR. BURNS: It runs the gamut from businesses to  
9 dentists, believe it or not, in the last couple years, to just  
10 average consumers.

11 THE COURT: But now you've represented a class whose  
12 rep was a better lawyer than you.

13 MR. BURNS: That's right. That's absolutely right. So  
14 kudos to Mr. Benck.

15 THE COURT: All right. Thank you. And that's no  
16 disparagement on your lawyering.

17 MR. BURNS: Of course, Your Honor.

18 THE COURT: I guess it would actually be the  
19 representative's representative. But be that as it may.

20 MR. BURNS: It is, Your Honor.

21 MR. RICHIE: Thank you, Your Honor.

22 THE COURT: So what -- we've kind of set the target up  
23 for you. What are you swinging at now?

24 MR. RICHIE: Okay. This is what I'm going to do. I'm  
25 going to double the allocation that's due to the self-funded

1 subclass and I'm going to double it again. And I'm going to do  
2 that in two moves only.

3 THE COURT: Okay.

4 MR. RICHIE: The first thing that needs to happen is  
5 we've got to go back and look at the statute of limitations  
6 issue that limits the self-funded subclass's claims period,  
7 because it's not justifiable.

8 We've briefed this issue a lot. I'm confident that the  
9 Court understands the brief. Here's the nub of the issue. It  
10 is true the original damages class in *Cervin* did not include any  
11 ASOs. It excluded them. But it also excluded large fully  
12 insured plans. So the question is not whether ASOs are in the  
13 damages class. The question is however large fully insured  
14 plans are brought into the damages class and given the original  
15 filing date of *Cervin*, does that logic apply equally to the ASO,  
16 the self-funded subclass. And the answer is clearly yes, it  
17 does. There's no equitable basis to exclude the self-funded  
18 subclass from the benefit given to the fully insured subclass.

19 Specifically, Your Honor, we can look at the language  
20 of the *Cervin* injunctive relief class. There's been lots of  
21 talk through the couple days of this hearing about how the  
22 injunctive relief that's being proposed in this class settlement  
23 benefits everybody. The injunctive relief class in *Cervin* is  
24 even broader than what's being considered today. It covered all  
25 persons or entities in the United States who are currently

1 insured by any health insurance plan that's currently a party to  
2 a license agreement.

3 THE COURT: So what do you make of this? *Cervin* was a  
4 case filed in North Carolina?

5 MR. RICHIE: Yes, Your Honor.

6 THE COURT: It was one of the cases centralized for  
7 multi-district litigation, along with others?

8 MR. RICHIE: Yes, Your Honor.

9 THE COURT: After that, the Court held a beauty  
10 contest, supervised by Mr. Gentle, in which it selected lead  
11 counsel for the subscriber class and landed upon, based upon the  
12 special master's recommendation, Mr. Boies and Mr. Hausfeld.  
13 For the record, I didn't meet with them in advance of that. I  
14 didn't think that Mr. Zott and Mr. Laytin would be particularly  
15 thrilled about me sitting down with Mr. Boies at the table ex  
16 parte at the beginning of the case and hearing all his great  
17 theories, so those got filtered through the special master. And  
18 at that point, the special master made a recommendation, and I  
19 appointed lead counsel and then asked lead counsel to fill out  
20 the slate.

21 And then I required a master complaint to be filed for  
22 purposes of this multi-district litigation. And that became the  
23 controlling complaint that we dealt with throughout the last  
24 nine years subject to some amendments along the way.

25 MR. RICHIE: Okay.

1           THE COURT: All right? So I guess my first question is  
2 as it relates to settling this multi-district litigation, even  
3 if you're right that *Cervin*, originally filed in North Carolina,  
4 had a broader injunctive relief class, does that portray any  
5 reality to how this multi-district litigation has been  
6 litigated?

7           MR. RICHIE: Your Honor, again, to cut straight to the  
8 quick, *Cervin* provides -- the filing date of *Cervin* is the date  
9 by which every fully insured class member can claim to, every  
10 single one of them. Included in any class --

11          THE COURT: So your argument is a relation-back issue  
12 now.

13          MR. RICHIE: Actually, Your Honor, this is just you  
14 have to treat all the subclasses equitably.

15          THE COURT: Okay.

16          MR. RICHIE: What you give to one, you have to give to  
17 another unless there's a principal reason not to.

18          THE COURT: All right.

19          MR. RICHIE: And there's just no principal reason here.  
20 Now, could --

21          THE COURT: So that's the first argument is they  
22 shouldn't have been cabined from a five-year limitations period  
23 starting in 2019?

24          MR. RICHIE: The argument is that the self-funded  
25 subclass was 100 percent included in the original injunctive



1 class in *Cervin*.

2 THE COURT: And therefore?

3 MR. RICHIE: Therefore, they have to get to go back to  
4 claim whatever the benefit of *Cervin* is that's given to the  
5 fully insured.

6 THE COURT: All right. Let's hold that.

7 Mr. Burns, do you want to address -- you or subscribers  
8 want to address that argument?

9 MR. BURNS: In terms of our division of labor, I think  
10 Mr. Hausfeld drew statute of limitations.

11 THE COURT: Fair enough.

12 MR. HAUSFELD: Your Honor, I think the controlling  
13 authority is the *Payco* case. And if I may read from the portion  
14 that deals with relation back. Relation back, at least on the  
15 facts of this case, would not accord with one of the rationales  
16 of *American Pipe* that commencement of the class action  
17 adequately notifies the defendants not only of the substantive  
18 claims being brought against them, but also of the number and  
19 generic identities of the potential plaintiffs who may  
20 participate in the judgment. Within the period set by the  
21 statute of limitations, the defendants must have the essential  
22 information necessary to determine both the subject matter and  
23 size of the prospective litigation.

24 With respect to the fully insured class, what was  
25 always in play at that point was fully insured individuals

1 paying premiums to the Blues for accepting the risk of insurance  
2 and providing that coverage. ASOs were specifically excluded  
3 from the damage class. When we were looking back at injunctive  
4 relief, that was prospective, not with relation to damages which  
5 had accrued.

6 THE COURT: All right. So let me ask you this. Just  
7 like the merits of the ESAs, I'm not being asked to address what  
8 the actual statute of limitations is for the ASO class.

9 MR. HAUSFELD: Yes.

10 THE COURT: I'm not being asked to address whether  
11 their claims, their damage claims, would travel back to the  
12 *Cervin* complaint.

13 MR. HAUSFELD: Correct.

14 THE COURT: You just explained to me why you don't  
15 think they would --

16 MR. HAUSFELD: Correct.

17 THE COURT: -- but putting that aside --

18 The question, Mr. Richie, isn't it this? Counsel can  
19 disagree with you and think that their claims may not be as  
20 forceful or meritorious as you think they are. The question is  
21 whether their handling of the settlement was reasonable in light  
22 of all those factors.

23 MR. RICHIE: No, Your Honor. I'm just making a  
24 simple --

25 THE COURT: Hold on.

1 MR. RICHIE: Go ahead.

2 THE COURT: And if it's reasonable, there would be a  
3 legitimate basis for distinguishing between the classes? In  
4 other words, equity -- what does it mean to deal with the  
5 classes equitably?

6 MR. RICHIE: Certainly, Your Honor.

7 THE COURT: If there are distinguishing defenses and  
8 arguments, whether it's statute of limitations, whether it's the  
9 limitation on pursuit of injunctive relief or damages relief,  
10 whether it's their claims just aren't as strong, whether it's a  
11 difference in competition in the markets, those are all things  
12 that would at least suggest that they don't have to be treated  
13 exactly the same when it comes to resolution of their claims.  
14 Am I off the mark?

15 MR. RICHIE: I think so, Your Honor. Because the basis  
16 that was just articulated was that ASOs were excluded from the  
17 original damages class. Well, so were large fully insured  
18 plans. So how can there -- how can those two be treated  
19 differently when they are situated exactly the same? They  
20 are -- to treat them equitably is to say they were both excluded  
21 from the original damages class.

22 THE COURT: What does master complaint do with large  
23 claims?

24 MR. RICHIE: My understanding is that large fully  
25 insured claims were not included in the damages class until the

1 settlement, but I will defer to subscribers' counsel on that  
2 one.

3 THE COURT: Is that true?

4 MR. HAUSFELD: They were not included, Your Honor.

5 THE COURT: Yes. That's what I thought. Okay.

6 MR. RICHIE: So we think that if there's --

7 THE COURT: So, Mr. Hausfeld, then, why don't you just  
8 address Mr. Richie's concern. Why are you treating them  
9 differently?

10 MR. HAUSFELD: This was raised and the subject of  
11 mediation, with Mr. Burns taking the position that the relation  
12 back with regard to ASOs should extend back. We brought this up  
13 to Mr. Feinberg. And then every once in a while, you get an  
14 invisible hand at the back of your head, and Mr. Feinberg  
15 indicated that there was a rational basis, you know, for a  
16 reasonable difference with regard to including the larger fully  
17 insureds because that was the subject of the complaint from its  
18 origin, that it was designed to recover damages for those who  
19 paid the Blues for premiums for assuming the risk, you know, of  
20 health insurance coverage and covered -- and charged premiums  
21 for them.

22 With regard to the ASOs --

23 THE COURT: So what you're saying is -- well, let me --  
24 Mr. Boies, I think, was about to chime in. Before I ask my  
25 question, let me make sure I take account of what he's about to

1 say.

2 MR. BOIES: Your Honor, I just wanted to bring to your  
3 attention two distinctions between the larger fully insured and  
4 the ASOs.

5 THE COURT: Which is what my question was about to try  
6 to get at, but I figured you were about to make a point.

7 MR. BOIES: Right. First, in terms of the overall  
8 class definition, we talked about insured, not ASOs. We talked  
9 about the insured. And the ASO people don't receive insurance.  
10 They receive the administrative services. And they are  
11 providing their own self-insurance, by definition.

12 So we thought that there was a much stronger argument  
13 for the relation back for the larger group, fully insured  
14 people, than there were for the ASOs.

15 THE COURT: Large and small.

16 MR. BOIES: Right. Large and small.

17 The second thing, when we had our damages class  
18 definition and we were talking about individual or small groups,  
19 we thought that there was a much closer nexus between fully  
20 insured with a distinction based on size compared to ASOs, which  
21 were an entirely different market. And that was -- this -- both  
22 of these were important because they go to the legal standard  
23 that Mr. Hausfeld was articulating, which is the extent to which  
24 people seeking relation back can point to the notice that is  
25 being provided to the defendants that puts them on notice as to

1 the nature of the claim.

2           The third aspect of it was that -- and both  
3 Mr. Hausfeld and I have mentioned this before -- the complaint  
4 actually distinguished the ASOs and put them in a different  
5 market. It didn't put the larger group of fully insured in a  
6 different market.

7           THE COURT: Early on, you were not necessarily inclined  
8 to take on the larger -- you were looking at smaller-sized  
9 insured, if I can be colloquial, the little guy --

10           MR. BOIES: Yeah.

11           THE COURT: -- when settlement discussions broke out.  
12 And you took on the large and small, broadened the class --

13           MR. BOIES: Right.

14           THE COURT: You did not feel you could, in good  
15 conscience, create a subclass of ASOs and thought they needed  
16 separate counsel because we're going to run into this -- this  
17 and other issues.

18           MR. BOIES: Yes.

19           THE COURT: It would have been inappropriate for you to  
20 decide the relation-back issue for the ASOs. You were going to  
21 let highly competent counsel come in and assess that argument  
22 and try to make that argument in front of either the Court or  
23 Mr. Feinberg or whoever else might listen to it.

24           MR. BOIES: Yes.

25           THE COURT: And so, again, I'm going back to this. If

1 this is something that was considered and discussed in the  
2 settlement and was a factor in the allocation, I'm not being  
3 asked, I don't think, to make a ruling on what the relation-back  
4 rule is here. The question is whether the parties' approach to  
5 it was a reasonable one such that it does not inequitably treat  
6 different groups differently.

7 MR. RICHIE: Your Honor, I'll respond to that, if I  
8 may.

9 THE COURT: Yes.

10 MR. RICHIE: Excuse me. Rule 23(e) is not merely  
11 procedural. There are substantive components to the fairness of  
12 the settlement that have to be considered. And we can't merely  
13 say that the parties negotiated it.

14 THE COURT: Well, when you say it's not merely  
15 procedural but I have to consider the fairness of the  
16 settlement, is that a -- that's not a substantive issue. It  
17 takes into account substantive issues, like the merits of the  
18 claim, the danger of continuing litigation, the uncertainty of  
19 litigation, the benefits to the class of ending litigation after  
20 nine years or three years or 25 years.

21 MR. RICHIE: So allocation is a zero-sum game. It's a  
22 piece of pie. It's a pie. Someone is going to get this much  
23 and someone is going to get the rest. So these subclasses are  
24 directly adverse to each other, and every dollar that they  
25 convince Mr. Burns to give up is a dollar that the subclass

1 loses and their class gains.

2 THE COURT: And vice versa.

3 MR. RICHIE: True.

4 THE COURT: Every dollar that Mr. Burns convinces them  
5 to give up is a dollar they don't get for their class they're  
6 representing.

7 MR. RICHIE: And so, Your Honor, we can't see behind  
8 the economics of the situation. I can tell you how the  
9 subclasses benefit, but we don't know how the fees are split  
10 between the classes. That's not something that we know --

11 THE COURT: When you say fees, you're talking about  
12 attorneys' fees?

13 MR. RICHIE: Yes. We don't know what -- the impact  
14 this allocation has on attorneys' fees. That's not something  
15 that --

16 THE COURT: How does that relate to the argument I  
17 thought you were making?

18 MR. RICHIE: So I want to get into the -- there are  
19 both procedural and substantive components to treating the  
20 subclasses equitably. And so showing that a settlement is fair,  
21 reasonable, and adequate. And there's another element to that,  
22 which is not the product of collusion. I certainly don't think  
23 this is a collusive settlement, but we don't have the --

24 THE COURT: There's no indication at all --

25 MR. RICHIE: No, no. There's not.



1 THE COURT: -- in any area code of the United States  
2 that this is a collusive settlement.

3 MR. RICHIE: No, no, no. I want to be clear on that up  
4 front. However, there are -- it's helpful --

5 THE COURT: It becomes less clear when you mention the  
6 C word, but I'm just making sure I understand our --

7 MR. RICHIE: No. It's in the standard. It's the  
8 Eleventh Circuit's word, not mine.

9 THE COURT: I gotcha.

10 MR. RICHIE: But here's the issue that I have looking  
11 at this, which is I can't understand the incentives that the  
12 class counsel were facing as it relates to the allocation. Now,  
13 that may be something we can take up in allocation later where  
14 we're talking generally about the legal standard that applies.  
15 And I wanted to go ahead and flag that there's a procedural and  
16 substantive element to equity and to the fairness of the  
17 settlement.

18 Specifically, on the element of the statute of  
19 limitations, as we talk about this, I cannot conceive of a  
20 scenario in which it would be equitable to say we will take one  
21 expressly excluded group of plans and we'll include them and  
22 we'll give them the benefit of a very early filing date, and  
23 we'll take another expressly excluded group of plans --

24 THE COURT: Well, you just heard the explanation. They  
25 think under the rational basis -- I'm sorry -- under the

1 relation-back test there's a better argument that the Blues were  
2 on notice that larger accounts, even within --

3 MR. RICHIE: Okay.

4 THE COURT: -- previous single-filed case  
5 definitions -- a better argument that they were on notice that  
6 those people may have rights that are held in abeyance pending a  
7 class determination in that case than ASOs that they say really,  
8 you know, unless you just parse the definition in one case,  
9 *Cervin*, can't be found in any of the class definitions.

10 MR. RICHIE: I'm sorry, Your Honor. I don't think that  
11 *Cervin* is -- the only reason we're talking about *Cervin* is not  
12 because I've looked around the room and found my friend. I'm  
13 pretty sure that this language or something very similar to it  
14 is in every one of these complaints. It's just that *Cervin* was  
15 first. And the fully insureds get to go back as far as  
16 possible. Now, the ASOs are treated as if they didn't know up  
17 until -- they were the last to the game.

18 Now, we've talked -- you've mentioned and they've  
19 mentioned the doctrine of relation back. Now, the doctrine of  
20 relation back --

21 THE COURT: So let me give you an example of something  
22 I specifically recall --

23 MR. RICHIE: Okay.

24 THE COURT: -- that occurred during a status conference  
25 that I think makes Mr. Boies' point.

1 MR. RICHIE: I would love to hear it. I don't know  
2 what this is.

3 THE COURT: And I'm going to ask Mr. Zott and Mr. Boies  
4 to correct me if I'm wrong, because I'm about to drag you -- one  
5 of our conversations into all this.

6 I remember Mr. Zott and Mr. Laytin standing on their  
7 heads in one particular status conference explaining to me about  
8 the unreasonableness -- and this is when we were in full  
9 litigation mode. This was before anybody was even thinking  
10 about a settlement -- the unreasonableness and unfairness and  
11 the lack of continuity between this huge class of a hundred  
12 million people that Mr. Boies was trying to certify and how -- I  
13 think they were explaining how unreasonable this whole  
14 litigation was in some context like that, to which Mr. Boies  
15 responded, Judge, I'm only seeking -- the class I'm actually  
16 pursuing is much smaller than they're representing to the Court.

17 MR. RICHIE: So this is the best fact for me that  
18 anyone has ever said because --

19 THE COURT: I don't think so.

20 MR. RICHIE: No. Because --

21 THE COURT: Hold on.

22 MR. RICHIE: Let me tell you. Let me tell you why the  
23 Eleventh Circuit thinks so.

24 THE COURT: Because no one at that point was  
25 contemplating anything about ASOs being in the case.

1           MR. RICHIE: To get to a hundred million, you have to  
2 include ASOs. It's the only way.

3           THE COURT: Well, I don't remember if it was a hundred  
4 million. But my point is that the argument that Mr. Zott and  
5 Mr. Laytin were representing was that this is this huge class.

6           MR. RICHIE: That's great for me. That's exactly my  
7 point because the only state of mind --

8           THE COURT: Not if it didn't include ASOs at that point  
9 under anybody's consideration. In other words, the point is  
10 what did the Blues understand was relating -- potentially they  
11 were facing?

12           MR. RICHIE: They thought this was huge. They thought  
13 it was everybody.

14           THE COURT: Exactly. They thought it was large -- they  
15 were contemplating it was larger insureds. And at that point is  
16 when Mr. Boies said, I'm only looking to represent the little  
17 guy here.

18           MR. RICHIE: Your Honor, it's going to take something  
19 really specific in the record that's not currently there that  
20 would say that --

21           THE COURT: Well, that's not in the record.

22           MR. RICHIE: Right.

23           THE COURT: I'm just telling you this forms some of  
24 my -- I won't call it a predisposition, but my understanding of  
25 what Mr. Boies is saying to me in this respect.

1 MR. RICHIE: If the defendants were contemplating a  
2 large class, they're the only one whose state of mind matters.  
3 What the plaintiffs' counsel thought of their class is not  
4 relevant to any test for relation back.

5 THE COURT: Exactly. But my point is -- and I think  
6 you're missing the last sentence of the paragraph. I think  
7 you're focusing on the first three sentences of the paragraph  
8 and you're ignoring the punch line. And that is even with  
9 that --

10 MR. RICHIE: Okay.

11 THE COURT: -- when ASOs got introduced into this, that  
12 was news to me. At no point at any time did the Blues or the  
13 subscribers suggest to me that ASOs were ever part of a target  
14 of this litigation. In fact, I think Mr. Boies is right. From  
15 time to time it might have been -- it may have come up -- I  
16 don't recall specifically -- but if it was, it would have been  
17 that's a different market.

18 MR. RICHIE: Couple of responses. First, I heard for  
19 the first time today that discovery was being done on ASO issues  
20 throughout the entire case. So it simply cannot be that no one  
21 anticipated that ASOs could be here.

22 THE COURT: No. Again, you're cherry-picking, to be  
23 perfectly candid here.

24 MR. RICHIE: I'm new. So I'm not trying to do so. I  
25 can only go --

1 THE COURT: Tell me what you heard and let's compare it  
2 to what was said.

3 MR. RICHIE: So what I heard was that there was  
4 discovery being done for ASOs for a couple -- I've heard a  
5 couple of different reasons. And again, I don't have the  
6 transcript. It's not my intention --

7 THE COURT: No. Tell me what you heard.

8 MR. RICHIE: Right. That's what --

9 THE COURT: You said, I heard something.

10 MR. RICHIE: That's right.

11 THE COURT: You had to have heard something. What did  
12 you hear?

13 MR. RICHIE: That's all I did. I heard a couple of  
14 things. One, there was an anticipation -- I'll go with three  
15 things, one I've already said. The defendants thought the case  
16 was much bigger than the subscriber plaintiffs thought it was.

17 THE COURT: But not ASOs. You keep leaving that off.  
18 But go ahead.

19 MR. RICHIE: That distinction was not at the time clear  
20 to me, but --

21 THE COURT: I just made it clear to you.

22 MR. RICHIE: Okay. Number two --

23 THE COURT: Because what happened was you jumped into  
24 the fray before I completed what I was explaining to you. But  
25 go ahead.

1 MR. RICHIE: That's my fault, Your Honor.

2 Number two was that there was discovery being done  
3 about ASOs throughout the case. Perhaps there was some mention  
4 about whether that was to distinguish the markets.

5 But third -- this is from yesterday -- there was a view  
6 at some point that ASOs might be brought in. And that makes  
7 perfect sense because from the Blues' perspective, they can't do  
8 a settlement --

9 THE COURT: No. Well, and I think in fairness,  
10 everybody always understood that ASOs were in the background of  
11 all this. There was always a chance that multi-district  
12 litigation of this type could include that.

13 But I -- Mr. Boies, I'm not going to put words in your  
14 mouth again. I might have already done it. How did ASOs play  
15 into your understanding? And then I'll let the Blues address  
16 the argument as well.

17 MR. RICHIE: Thank you, Your Honor.

18 MR. BOIES: And, Your Honor, let me just clarify. When  
19 we took discovery, we took discovery that related to the entire  
20 market. And that, to some extent, included ASOs. And we were,  
21 as I said, trying to distinguish ASOs from the fully insured to  
22 try to show that they were different markets.

23 But whether it came to the structured data that related  
24 to statistics that would go to showing damages and the like, the  
25 Court will recall that Blues didn't produce the stuff with

1 respect to ASOs. They produced the stuff with respect to --

2 THE COURT: And you didn't pursue that.

3 MR. BOIES: And we didn't pursue that. They did  
4 produce the data that related to fully insured, both larger ones  
5 and smaller ones. We got -- we got that, but we didn't get the  
6 ASO. From the very beginning --

7 THE COURT: But you did from time to time explain to  
8 me, Judge, the Blues can have more competition in the market  
9 we're pursuing because they have more competition in the ASO  
10 market.

11 MR. BOIES: Exactly right. Exactly right, Your Honor.

12 THE COURT: That wasn't the focus of your damages model  
13 or even an injunctive relief target, but that was a constant  
14 reminder to me of, Judge, you know, they say that they need  
15 these exclusive service areas and they say they need national  
16 best efforts and that say they're trying to strengthen their  
17 mark and they say this is a new product and they say all these  
18 things, but yet, look at the ASOs. They let the ASOs actually  
19 violate the exclusive service agreement rule based upon the  
20 Blues' own rules at that time.

21 MR. BOIES: And --

22 THE COURT: They -- you could actually do business with  
23 someone who wasn't in your service area even under preexisting  
24 Blue rules; right?

25 MR. BOIES: Under certain circumstances.



1 THE COURT: At least that's what I'm -- under  
2 certain -- yes. That's what I'm talking about. Under the  
3 Blues' model at that time.

4 Okay. So I'm trying -- you know, look, not -- the  
5 objectors don't have the benefit --

6 MR. BOIES: Sure.

7 THE COURT: -- of where we've been. And I'm trying  
8 to -- maybe I'm stumbling all over the block trying to do it.  
9 I'm trying to explain where we've been and what it means. So  
10 maybe you can do a better job of that than I've done.

11 MR. BOIES: I don't think I can, Your Honor, because, I  
12 mean, the point is very simple. From the beginning, we were  
13 focusing on the fully insured market. That's what our papers  
14 said. That's what our discovery was about. That's what the  
15 defendants were on notice about. When we talked about them  
16 saying we had a big class, they were talking about the fully  
17 insured. They weren't talking about the ASOs. No one was ever  
18 suggesting that the ASOs were part of our -- part of our  
19 litigation.

20 We found out a lot of stuff about them as part of the  
21 discovery. We knew a lot about them. We were able to  
22 distinguish those markets from the fully insured markets. That  
23 was important to showing why the impact was particularly great  
24 on the class that we were initially representing.

25 But in our view, there was just no basis for a

1 relation-back argument with respect to the ASOs. In our view,  
2 there was --

3 THE COURT: All right. Let me -- but Mr. Richie may  
4 have a point. The key is what did the Blues understand.

5 MR. BOIES: Well, I --

6 THE COURT: What were they on notice of?

7 MR. BOIES: I think they were -- I'll let them speak  
8 for themselves, but I think the record shows that they were on  
9 notice of a fully insured set of claims, not the administrative  
10 service organization set of claims.

11 And I would just emphasize again -- I know the Court  
12 has already done this, but I would emphasize again that what's  
13 important here is not are we right about the relation-back  
14 theory. The question is did we make a fair and reasonable  
15 judgment. And --

16 THE COURT: And does it result in inequitable  
17 treatment.

18 MR. BOIES: And does it result in unequal treatment.  
19 And the argument that he's making is really an argument on  
20 behalf of certain fully insured people. It's not on behalf of  
21 his objector.

22 THE COURT: Okay. Mr. Laytin?

23 MR. LAYTIN: Thanks. Hopefully four sentences. The  
24 first, we agree that you don't need to decide the applicable  
25 statute of limitations. The second is if you do want to create

1 new law, though, I'd love law that says that it's the hearts and  
2 minds of defendants to decide the plaintiffs' statute of  
3 limitations. So feel free.

4 THE COURT: Are you saying if that was the actual rule,  
5 you would feign ignorance?

6 MR. LAYTIN: The ostrich rule. I think we would end up  
7 as a bunch of --

8 THE COURT: But I think it's really what objectively  
9 you're on notice of.

10 MR. LAYTIN: Agreed.

11 THE COURT: That's the question.

12 MR. LAYTIN: So the third point is the context for the  
13 standing on our head, which I recall doing quite often on this  
14 point, was really the size of the Blue system, the impact that  
15 this kind of case would have on, you know, anyone, just given  
16 the markets we're talking about in general, not really applying  
17 to the particular plaintiffs on which they were -- we're suing  
18 on behalf of.

19 And the final point is, you know, we did -- and I think  
20 it was in front of Your Honor -- have questions on this point.  
21 And plaintiffs, as masters of their complaint, defined it.

22 THE COURT: So who has coached Little League Baseball  
23 before?

24 (Counsel responds)

25 THE COURT: Okay. And when your son plays Little

1 League Baseball and you're a head coach, you live two lives.  
2 The first life is the Little League Baseball draft that starts  
3 the season off each year. My son was a pretty good baseball  
4 player; I coached him. Some other coaches in the league thought  
5 their sons were pretty good baseball players; they coached them.  
6 But when we show up to the draft, I assure you my son was no  
7 better than a third-round draft pick because he was going to  
8 automatically be assigned to my team. And I didn't -- I wanted  
9 to get two people in the draft before I had to take Jake -- or  
10 before I got to take Jake.

11 MR. LAYTIN: Is that what you told him later?

12 THE COURT: Yeah. So every dad in the room is  
13 explaining in the draft why my son is a third-, second-, fifth-,  
14 later than a fifth-round pick. Then you play the season and  
15 then you get to the All Star vote. Jake is no longer a  
16 third-round pick. He is one of the top 12 players in the  
17 league. And that is a microcosm of the difference between  
18 litigating a class for the parties and settling a class for the  
19 parties.

20 Parties may take all manner of different positions in  
21 litigation. Mr. Boies and Mr. Hausfeld have done just that. If  
22 this was litigation, they would not be conceding some of the  
23 things they're conceding today. Okay? If this was litigation,  
24 Mr. Burns may very well have a different view and present it on  
25 what his damages model ought to look like in a

1 contested-before-the-jury case. What we're looking here,  
2 though, is what happens when the parties agree to turn the  
3 swords into plowshares, plow common ground, reach an agreement,  
4 and move on.

5 So, Mr. Richie, you're right. These can't -- these  
6 groups can't be treated inequitably. And there has to be a  
7 rational reason behind where we are with respect to the proposal  
8 of this settlement.

9 But guess what? Not only do the parties' roles change,  
10 the Court's role changes. I'm no longer -- I'm no longer making  
11 findings of fact as appropriate or conclusions of law as  
12 appropriate on the merits of things in the litigation track.  
13 I'm now having to now assess fairness, adequacy, reasonableness,  
14 and compliance with Rule 23 requirements in the settlement  
15 contest.

16 MR. RICHIE: Correct.

17 THE COURT: All right. So -- and I think a lot of the  
18 argument I've heard has blurred those lines. So help me.

19 MR. RICHIE: Yeah. That's what I would like to do.

20 And if I might use the microphone here. Thank you.

21 THE COURT: You may.

22 MR. RICHIE: I'm not trying to relitigate or to  
23 litigate this matter. What I'm trying to say is that sauce for  
24 the goose is sauce for the gander. And if -- there are a lot of  
25 factual reasons why I think that I'm right. For example, we

1 will hear from Dr. Mason on the stand when I cross him --  
2 because he wrote it in his report -- that large fully insured  
3 plans and ASOs are substitutes for each other. They are in the  
4 same market. That's where plans move back and forth. Now,  
5 maybe not at the very largest end of the ASO market, but if  
6 someone is large enough to be a large fully insured plan --

7 THE COURT: But you haven't explained why ASOs --

8 MR. RICHIE: And fully insureds are similarly situated.  
9 And so what we keep --

10 THE COURT: Except for the fact that one purchases a  
11 product to insure a risk and one doesn't.

12 MR. RICHIE: Except that when you're a large plan --  
13 this is Dr. Mason talking, not me -- they can -- and I think  
14 Your Honor even noted this in the standard-of-review opinion.  
15 At the larger end of fully insured, the ASO market is a direct  
16 substitute. Those parties can move back and forth.

17 The point is not to argue the economic theory. It's  
18 just to argue that these are similarly situated groups and they  
19 have to be treated similarly.

20 THE COURT: Except -- except when it comes to, it seems  
21 to me, how you get to purchase your insurance, what steps you go  
22 through purchasing your insurance.

23 MR. RICHIE: I think --

24 THE COURT: Do you think those are similar for a large  
25 national account and an ASO?

1 MR. RICHIE: So I'm sorry, Your Honor. I think that  
2 they're similar between members of the ASO class and members of  
3 large group, fully insured class. Yes, Your Honor. I don't  
4 think there's any record evidence --

5 THE COURT: Well, let me ask you this. If you -- and  
6 I'm just trying to break it down to simple bases here.

7 MR. RICHIE: Certainly.

8 THE COURT: You're the broker representing both a  
9 national account and an ASO account.

10 MR. RICHIE: Uh-huh.

11 THE COURT: And I tell you, all right, we will offer  
12 insurance to your national account and we will insure all risks  
13 they have and we will offer services to your ASO account and we  
14 will administer their self-funded account, and we want you to  
15 pay the same for both services.

16 MR. RICHIE: So wait. Were both of those instances  
17 ASOs?

18 THE COURT: No.

19 MR. RICHIE: Okay.

20 THE COURT: One is a national account that's --

21 MR. RICHIE: Okay. National account is fully insured.

22 THE COURT: -- fully insured. One is an ASO that's  
23 self-insured.

24 MR. RICHIE: Okay. Yes. Those two are competing in  
25 the same market.

1 THE COURT: No. But the price would be different.

2 MR. RICHIE: The price would be different because --

3 THE COURT: Okay. Well, isn't the damages model based  
4 upon what you paid for your service and what you should have  
5 paid for your service if competition had been in that market?

6 MR. RICHIE: At a very high level of generality, yes.  
7 But we're missing a -- there's a lot more that goes into that.  
8 So I don't want to give an unqualified yes, it's that simple. I  
9 think it's a lot more complicated than that.

10 But I'll just take -- I'll take Dr. Mason's viewpoint  
11 that says that the large group plans are in the same market and  
12 their price is constrained by ASOs. Now, there might be  
13 customers that prefer the certainty of a fully insured plan: I  
14 don't have to worry about it; my risk is fixed. A lot of them  
15 want to manage their risk and have a lower price. But those  
16 large group plans --

17 THE COURT: Am I just missing the logic of this? And  
18 maybe I'm just -- I've only run one business. I formed my own  
19 firm in 1993 and operated it until 2003. But for that ten  
20 years, if you would have told me that Blue Cross Blue Shield  
21 would pay me if I had an insurance claim, health insurance  
22 claim, versus I would have to pay out of my own pocket if I had  
23 a claim for the medical provider --

24 MR. RICHIE: So that's not actually --

25 THE COURT: -- but they were going to administer both



1 plans and handle all the stuff, but I could pay the same for  
2 both, I would think that's not a great deal. So am I missing  
3 something?

4 MR. RICHIE: Your Honor, I did not ever -- excuse me if  
5 I've given the wrong impression. I'm not -- I don't intend to  
6 say that they are -- they charge the exact same price for those.  
7 Obviously, they don't. One of them includes the cost of claims;  
8 one of them doesn't.

9 THE COURT: Right.

10 MR. RICHIE: But I've heard -- I mean, I don't want  
11 to -- I'm getting ahead of myself a little bit. I would  
12 really -- if it's possible to focus back on the statute  
13 question.

14 THE COURT: So my point is you may be -- I'm not making  
15 an opinion about this, but you may be right that they're in the  
16 same market --

17 MR. RICHIE: Right.

18 THE COURT: -- when it comes to what we expect for a  
19 level of computation and what we should expect for a level of  
20 competition. They are not in the same damages model in any way,  
21 shape, or form, because they put different numbers on the board  
22 if they're in front of a jury or in front of a mediator; right?

23 MR. RICHIE: So there are certainly ways that they  
24 could be done -- it could be done the way that it's been done.  
25 There are other ways that actually do put them on the same board

1 because the cost --

2 THE COURT: If the same lack of competition affected  
3 the price point for someone who's paying less and a different  
4 entity who's paying more, doesn't it follow that the entity  
5 paying more would have a greater damages claim, just generally,  
6 then the entity who pays less for a service?

7 MR. RICHIE: If you take into account all the payments  
8 that are --

9 THE COURT: And I'm assuming you're right that they're  
10 all in the same market with a lack of competition.

11 MR. RICHIE: So maybe I can answer that question. I'm  
12 not trying to dodge it, so stop me if I'm going down a rabbit  
13 trail.

14 THE COURT: Stop. Just answer the question.

15 MR. RICHIE: Okay. Well, this is what I'm trying to  
16 do. When most ASO plans -- again, it's done differently for  
17 different plans, but --

18 THE COURT: I think the answer to the question is yes.  
19 Those would be -- there would be higher damages that party A  
20 could expect compared to party B. But go ahead.

21 MR. RICHIE: But so this is why -- I'm not trying to be  
22 inaccurate, and this is not a presidential debate. So I've  
23 heard you say it before. I want to be straight to the point.

24 Most fully insured plans, from the information that  
25 I've -- excuse me. Most self-insured plans, from the

1 information that I've reviewed -- and again, I've got limited  
2 access -- actually pay the Blues for their claims. The Blues  
3 pay their claims. They administer the claims and then they pay  
4 them and then they invoice the self-funded plan and the  
5 self-funded plan writes a check. That's not universal. It's  
6 not always done, but it's very commonly done. And that's how  
7 the Blues measure their compliance.

8 THE COURT: That's part of the servicing agreement,  
9 though.

10 MR. RICHIE: But that is a common way that it happens.  
11 So can you put those two on the board together? You can put  
12 those two on the board together.

13 THE COURT: All right. But that's --

14 MR. RICHIE: I mean --

15 THE COURT: Maybe. Maybe. I've got --

16 MR. RICHIE: We're speaking in generalities.

17 THE COURT: I'd probably have to think through that,  
18 but -- because, actually, I would think the price points would  
19 be different because the Blues can count on we are going to have  
20 zero loss on you as an insured if we're just fronting the money  
21 and you're reimbursing us for it.

22 MR. RICHIE: Yeah. There's some risk involved --

23 THE COURT: On the other hand, this other large  
24 account, we may -- they may pay a premium and we may pay 15  
25 times that during a period because they have such a high

1 experience rating. And it seems to me that would be built into  
2 pricing.

3 MR. RICHIE: They're constrained a little bit, though,  
4 by the medical loss ratio. So the best they can ever do is --  
5 if you're talking about a large plan, a large plan has to pay  
6 out 85 cents on the dollar of premiums as medical claims. So  
7 really, they only have 15 cents to play with. But at that  
8 point, we're now -- you've got that 15 cents on the dollar.

9 THE COURT: Let's let the subscribers and the ASO --  
10 hold on. Let me let them weigh in on our little debate here.

11 MR. RICHIE: Certainly. But can I move on and  
12 finish --

13 THE COURT: No. No. I told you to hold on.

14 MR. RICHIE: Certainly.

15 THE COURT: Because, believe me, it helps me if I put  
16 apples next to apples. And if you're moving on to the next  
17 point, I'd like them to have the opportunity to address that.

18 MR. RICHIE: Certainly, Your Honor.

19 MR. HAUSFELD: Your Honor, Warren and I conducted the  
20 mediations principally with Mr. Feinberg. Both positions were  
21 put forward. They argued vigorously that their claim could  
22 relate back. We argued vigorously no, it didn't.

23 THE COURT: No. I'm asking you a different question.

24 Mr. Burns, would you expect your ASO clients to be  
25 charged at the same price point as Mr. Hausfeld's clients --

1 MR. BURNS: No.

2 THE COURT: -- even if you're not asking them to insure  
3 a risk?

4 MR. BURNS: Absolutely not, Your Honor, because risk is  
5 the deal.

6 THE COURT: I mean, that's simple economics, isn't it?

7 All right. Blues, you know your business model better  
8 than anybody else here.

9 MR. ZOTT: Agree with Mr. Burns. He's right.

10 THE COURT: All right. So, I mean, again, I don't  
11 understand why this took 15 minutes. This seems like this  
12 should have taken 15 seconds. Those are different -- those  
13 would have to be different price points, even if they're in the  
14 same market, that would affect a damages calculation in  
15 litigation or in settlement discussions.

16 MR. RICHIE: Could -- and, Your Honor, I never meant to  
17 represent that they were exactly the same. My question was can  
18 you put them in the same pot, can you compare them and compare  
19 apples to apples. And I think the answer is yes. And I don't  
20 think that's a controversial position. I would certainly agree  
21 and our experts have agreed --

22 THE COURT: Well, it's fairly controversial to me  
23 because I don't understand it.

24 MR. RICHIE: Our expert certainly has testified --

25 THE COURT: Look, I don't know that I need an economics

1 expert to explain to me that if I am getting you -- let's just  
2 do car insurance. If I'm hiring you to handle an insurance  
3 claim but I'm paying for my car if it's damaged or if I'm paying  
4 for somebody's claim of liability against me if I'm liable  
5 versus I'm asking you, as the insurance company, to not only  
6 process the claim, hire a lawyer for me if necessary, and also  
7 pay for the claim. That's going to cost me more money. And if  
8 there's some -- if there's some nonsense in the way they're  
9 going about ordering the market that causes me to pay more than  
10 I should and I've already -- I'm going to be out more money if  
11 I'm paying more for the premium.

12 MR. RICHIE: So, Your Honor, in that circumstance you  
13 just described, hundred percent, absolutely.

14 THE COURT: Okay.

15 MR. RICHIE: I think, reality, my understanding of the  
16 market that's actually at issue here doesn't map perfectly onto  
17 that hypothetical, but I agree completely with the principle  
18 that you just articulated.

19 THE COURT: All right. But it seemed like you were  
20 pushing back on that.

21 MR. RICHIE: No, Your Honor. I think I made the  
22 mistake of saying that your -- I was trying to say that reality  
23 is more complicated than that example, and I should not have  
24 done that. I apologize.

25 THE COURT: Okay. Go ahead.

1 MR. RICHIE: Your Honor, I would like to --

2 (Telephone interference)

3 MR. RAGSDALE: Sorry, Judge. Not a phone call.

4 MR. RICHIE: I would like to, if possible --

5 THE COURT: At least you were the only one to own up to  
6 it in the whole courtroom today. Everybody else just kind of  
7 started looking at somebody else like it was them.

8 MR. RAGSDALE: I'm not (inaudible).

9 MR. RICHIE: No. Your Honor, I don't want to get too  
10 far -- well, the easiest way to resolve this entire issue is  
11 just to look at the class definition. Instead of dealing with  
12 states of minds, instead of dealing with what someone intended,  
13 it's long been my understanding that the best place to look for  
14 what someone intended is to look at the words that they used.

15 And the requirement of rejecting my position gets to a  
16 kind of absurd interpretation of what it means to have health  
17 insurance. You would have to say that someone who is -- has a  
18 self-funded plan isn't health insurance under the *Cervin*  
19 complaint because it -- I've got the complaint. I would have to  
20 move off the podium here, Your Honor, but --

21 THE COURT: I guess while you're finding that, my point  
22 that I'm trying to make is this. There are multiple factors  
23 that go into whether or not an ASO and even a national account  
24 should be treated similarly. One is what is appropriately  
25 calculated to be a statute of limitations based upon some

1 relation-back doctrine, but that's not the only one. One --  
2 another would be what we just -- the process we just engaged in,  
3 and that is are they in the same market? Is there more  
4 competition? An ASO -- do you seriously dispute here today, in  
5 light of everything you know about the case and what you've  
6 heard the last two days, that an ASO, as opposed to a national  
7 account, doesn't have more competition for its business than a  
8 national account?

9 MR. RICHIE: We might dispute the degree, but I don't  
10 dispute the general proposition.

11 THE COURT: There's a difference. Yes. There's a  
12 difference. So what we're doing now is quantifying degrees, not  
13 qualifying the difference.

14 MR. RICHIE: And with the reservation that those  
15 degrees can be different based on other factors.

16 THE COURT: Sure. Sure. That's a factor.

17 MR. RICHIE: So --

18 THE COURT: Another factor is how much you pay for the  
19 product and, therefore, what damages you'd be able to put on the  
20 board if you are ultimately successful in proving liability.  
21 So --

22 MR. RICHIE: Your Honor, what I'm wanting to say is  
23 that ASOs are persons or entities in the United States who were  
24 at the time currently insured by any health insurance plan that  
25 was at the time a license -- was a party to a license agreement



1 with the Blue Cross Blue Shield Association.

2 I don't understand there to be any basis to dispute  
3 that fact. They were members of the injunctive relief class at  
4 the time, at the very beginning. If it's enough to be a member  
5 of the injunctive relief to relate back, then ASOs are  
6 absolutely covered. And if there were any doubt on that, if  
7 that was ambiguous --

8 THE COURT: Would they relate back only to the -- I'm  
9 not sure of this.

10 MR. RICHIE: But --

11 THE COURT: Would it relate back only to the injunctive  
12 relief class?

13 MR. RICHIE: But if it was listed in the --

14 THE COURT: If they're not listed in a (b) (3) damages  
15 class --

16 MR. RICHIE: So that's the --

17 THE COURT: -- can they rely upon a (b) (2) injunctive  
18 relief class to say we didn't have to come in and assert our  
19 damages claim?

20 MR. RICHIE: That's what the fully -- that's what the  
21 large group, fully insureds did. So if you're going to give it  
22 to one, you can't deny it to the other. Because those were  
23 also, undisputably, not members of any damages class.

24 THE COURT: All right. So let me ask you this, because  
25 this is an important bottom-line question for me.

1 MR. RICHIE: Yeah.

2 THE COURT: Do you think Mr. Feinberg was smart enough  
3 to grapple with all these arguments that were bandied back and  
4 forth? Because Mr. Burns made similar arguments that you're  
5 making today.

6 MR. RICHIE: I can't possibly comment on Mr. Feinberg.  
7 He emphasized the statute of limitations as being a defense that  
8 he used to lean on. I have his declaration, but he was leaning  
9 on the --

10 THE COURT: Yes. No, he thought that was an issue  
11 for -- he thought that was a large issue for Mr. Burns' clients  
12 in the case. He thought that was a weak point for them. He's  
13 made that very clear to us.

14 MR. RICHIE: Yes. I think that was --

15 THE COURT: And he's a -- he's not representing  
16 Mr. Hausfeld's clients. He's not trying to represent your  
17 clients. He's a neutral. And that's just the way he sized it  
18 up as he assessed the parties' various mediation positions.

19 MR. RICHIE: Uh-huh.

20 THE COURT: So --

21 MR. RICHIE: I think there's procedural fairness there.  
22 But I also think that he got it wrong. If that was his  
23 position --

24 THE COURT: Well, how is there procedural fairness  
25 there? Because Mr. Burns' clients --

1 MR. RICHIE: I said fairness. I thought that  
2 procedurally --

3 THE COURT: Oh, you say that was procedurally fair to  
4 have a -- okay.

5 MR. RICHIE: Yeah. Right. I think the involvement of  
6 a third party is great. But I have to be able to look at the  
7 results and square the result with a principle that I can  
8 articulate. Because I can't articulate the principle, I cannot,  
9 on a principle basis, say that a --

10 THE COURT: Here's the problem. I was an advocate once  
11 too, but you are now.

12 MR. RICHIE: Uh-huh.

13 THE COURT: And I could get so enamored with my case  
14 that I couldn't see that far to see the other side. So I guess  
15 my question to your side would be this. If I'm a neutral and I  
16 understand the argument and if Mr. Feinberg is a neutral and he  
17 understood the argument and Mr. Burns and Mr. Hausfeld are not  
18 neutrals but they understand the argument, then why doesn't your  
19 side understand the argument?

20 MR. RICHIE: Your Honor, I'll let everyone --

21 THE COURT: And I'm not -- that's not a shot. That's  
22 just trying to get a handle on everybody else sees this, I'm not  
23 sure you see it, and I'm trying to understand why.

24 MR. RICHIE: So here's what I'm really struggling --  
25 I -- in our briefs, the response that we got back when we raised

1 this argument about, well, you have to treat the fully insured  
2 large groups the same as the ASOs, if the large fully insured  
3 groups are getting added back, then the ASOs have to be too, the  
4 response was ASOs aren't health insurance. Except they are in  
5 every sense of the word that matters.

6 THE COURT: Well, but you've acknowledged that even if  
7 they should have been treated equitably for the statute of  
8 limitations, which is your position, there should have been a  
9 larger recovery period attributable to them in these allocation  
10 negotiations, which Mr. Burns, by the way, argued, did you not?

11 MR. BURNS: Yes, sir.

12 THE COURT: Yes. But you also have acknowledged that  
13 they're not similarly situated when it comes to this price point  
14 we just talked about and they wouldn't be similarly situated  
15 when it comes to a damages model that we've talked about.  
16 They're not similarly situated when it comes to the level of  
17 competition for their business that we've talked about.

18 MR. RICHIE: That's not the justification that the  
19 proponents of the settlement have advanced. It's a different  
20 argument.

21 THE COURT: I think they've advanced all of them. But  
22 whether they've advanced it or not, that's what the Court  
23 understands in evaluating this circumstance.

24 MR. RICHIE: If I were a person who was looking at this  
25 class definition that seeks -- Cervin sought to completely

1 undo --

2 THE COURT: I'm trying to move you off that argument  
3 and address the other two arguments, in case you haven't noticed  
4 that.

5 MR. RICHIE: Okay. Well, let's go, then. The Blues  
6 refer to covering more than a hundred -- they refer to covering  
7 well in excess --

8 THE COURT: I'm trying to move you off that argument --

9 MR. RICHIE: Okay.

10 THE COURT: -- and get you to address the other two  
11 arguments on lack of -- dissimilar amount of competition --

12 MR. RICHIE: Okay.

13 THE COURT: -- for the business and different economics  
14 on the monetary damages, because that's really what we're  
15 focused on here. We're not -- when it comes to allocation,  
16 we're not focused on anything about injunctive relief.

17 MR. RICHIE: Okay. So, Your Honor, we're -- if I  
18 understand you correctly -- and I want to make sure, because my  
19 notes are organized differently. You have -- you've heard  
20 argument about -- all that you want to hear about the claims  
21 period and you want me to move on to substantive issues --

22 THE COURT: I'm not going to pretermitt that. I asked  
23 you a question, and you are kind of being a political candidate  
24 now --

25 MR. RICHIE: I'm not trying to.

1 THE COURT: -- and trying to put what you think is your  
2 best argument forward.

3 MR. RICHIE: So --

4 THE COURT: Focus on the two things I've asked you  
5 about: lack of competition in the national account market as  
6 compared to the ASO market and a higher damages model, at least  
7 arguably, in the national account market as compared to the ASO  
8 market.

9 MR. RICHIE: So, Your Honor, I don't have -- I've  
10 objected on behalf of the entire ASO class. So I don't think  
11 that there is or should be a different damages model as between  
12 large national accounts and ASOs. That's not an objection I'm  
13 advancing. I don't -- if there is, that makes no difference  
14 to my objection as we've articulated it. I don't know if we  
15 have anything responsive on that point.

16 THE COURT: Okay. What about competition?

17 MR. RICHIE: So our difference --

18 THE COURT: What about the difference in competition?

19 MR. RICHIE: Yes, Your Honor. I just want to make sure  
20 that I understand. Are we speaking of this in terms of the  
21 allocation itself or in terms of whether these are similarly  
22 situated classes for purposes of determining the claims period?

23 THE COURT: No, not the -- I told you I'm not asking  
24 anything about a claims period.

25 MR. RICHIE: Okay.

1           THE COURT: I'm asking you about what would be the --  
2 so one of the things we evaluate, as you know, is what are the  
3 likelihood of success on the merits. What can a party  
4 reasonably expect about, A, winning their case and, B, what the  
5 recovery would be if they won? So I'm asking about those two  
6 things. I'm asking about, okay, are they more likely to prove a  
7 violation of the Sherman Act if there's more competition in the  
8 market they're participating in as compared to less competition  
9 in the market that someone -- for the business that another is  
10 and, two, what happens when, even if we win, our damages model  
11 probably is more limited because our price point for the  
12 insurance we paid for, the service we paid for, is different  
13 compared to our comparator.

14           MR. RICHIE: It's a critical question, Your Honor. I'm  
15 going to start at the very beginning with answering it, which is  
16 what's in the record. Because there is no evidence in the  
17 record at all relating to the *Bennett* factor of the likely  
18 recovery of the ASO class. Zero. There was no analysis done.

19           The only declaration that speaks to that issue is  
20 Dr. Pakes. And Dr. Pakes says two things: one, I performed an  
21 analysis of the fully insured; and then, number two, it has been  
22 determined by somebody else that 6.5 percent is reasonable. And  
23 so the settlement number is used to determine what's the likely  
24 recovery. And the likely recovery is then parroted back to say  
25 the settlement is fair. That same number is in two places.

1           THE COURT: But yet you've just heard the explanation  
2 of how that came about with the brackets that were in place,  
3 Feinberg's involvement with the mediation, the fact the parties  
4 couldn't agree on an allocation, they agreed to get a  
5 third-party neutral involved, they presented this to the  
6 third-party neutral, and he navigated them toward this  
7 allocation that we have in place. So the record -- there is  
8 evidence in the record about how we reached the allocation.

9           MR. RICHIE: There is certainly evidence about  
10 allocation, but allocation is not the same as what's the likely  
11 recovery in litigation. That analysis was never done. It was  
12 done for one class, it wasn't done for the other.

13          THE COURT: Yes. I don't know -- I don't think there's  
14 anything in the record about what the likely recovery for the  
15 subscribers would be to the quantifiable point that I think  
16 you're advocating.

17          MR. RICHIE: Your Honor, actually, all that I'm  
18 advocating for is the difference from something and nothing,  
19 because Dr. Pakes gives something for the fully insured class  
20 and gives nothing but the settlement number for the ASO class.  
21 As a matter of law, I think that's insufficient.

22               And it is literally all that is in the record.  
23 Paragraph seven -- just a second. In paragraph seven of  
24 Dr. Pakes' declaration, that's the representation. It just says  
25 that the settlement number is what was used. So we have to



1 start from there, that there's nothing in the record about the  
2 *Bennett* factor, which applies in this case and will govern, that  
3 says what the ASO class's likely recovery in litigation could  
4 have been.

5           So we don't have what's required. We don't have that  
6 "what's my best day" comparison that we can then work back to  
7 and so we can determine, as the fourth *Bennett* factor says,  
8 where on that line are we being reasonable and adequate, where  
9 have we hit -- recognizing all the risks and delays of  
10 litigation, where have we hit the point where we can say it's  
11 fair, reasonable, and adequate. We don't know what the  
12 denominator is. What's my best day? We don't even have an  
13 estimate of it. So whatever that numerator is, we don't know  
14 what it's over. It's divide by zero, invalid, go back. So  
15 that's where I start.

16           But if we were to base -- you know, using market data,  
17 using the reports that our experts have provided, using I think  
18 some important facts that find their way through Dr. Mason's  
19 report, if we use general industry data, we can actually  
20 backfill and come up with some estimates, but they're not -- no  
21 one has done the required analysis.

22           THE COURT: All right.

23           MR. RICHIE: My cocounsel would like to speak.

24           MR. MULLINS: Good afternoon, Your Honor.

25           THE COURT: Good afternoon.

1 MR. MULLINS: I'm Rick Mullins from the McAfee & Taft  
2 Law Firm in Oklahoma City and cocounsel with Mr. Richie with the  
3 self-funded objectors.

4 THE COURT: Welcome.

5 MR. MULLINS: Thank you. I'm glad to be here.

6 So I just wanted to address a couple of these issues on  
7 allocation and percentages and the competition things that you  
8 asked about.

9 And first of all, we have provided in our expert  
10 reports -- we've got three of them, two of them by the BDO firm  
11 and one of them by Teah Corley. And in all three of the  
12 reports, they describe the allocation that they think is  
13 appropriate here. All of those involved in this actually are in  
14 the health care business. Dr. Mason is not in the health care  
15 business, but these folks are. They do this for a living.

16 And Ugo, our witness today, is going to talk about what  
17 is -- what goes into the pricing. And what does not go into the  
18 pricing for plans for both fully insured and self-funded is this  
19 purported lack of competition for self-funded plans. He will  
20 tell you -- and he worked at Blue Cross for 12 years doing the  
21 exact kind of thing that we're talking about here. Now he's in  
22 the private world working for a consulting firm; but in his 12  
23 years at Blue Cross Blue Shield, he employed the exact same  
24 methodology that he employed to come up with a spread of damages  
25 in this case or how -- what's a fair allocation. And that's the

1 premium equivalent method. And we'll hear about that in a few  
2 minutes.

3 But what he has done is he says this is the industry  
4 standard for determining the spread between what a fully insured  
5 plan pays for and what a self-funded plan pays for. They all  
6 pay for the same services. Now, in a self-funded plan, they can  
7 pick and choose some of these ancillary services that we've  
8 mentioned in our briefing, but they pay for every one they get.  
9 All of those are the same things that are wrapped up in the  
10 fully insured premium that the fully insureds paid. So --

11 THE COURT: All right. Let me stop you because I'm  
12 reminded from two different directions that not everyone can sit  
13 still for three hours like me. So we're going to take a short  
14 break, and I'm going to let you conclude your remarks after  
15 that.

16 MR. MULLINS: Great. Thank you.

17 MR. RICHIE: Thank you, Your Honor.

18 (Recess at 1:58 p.m. until 2:31 p.m.)

19 THE COURT: All right. Ready to get started back?

20 MR. MULLINS: Yes, sir.

21 THE COURT: I think I interrupted you, sir, but with  
22 good reason.

23 MR. MULLINS: Very good reason. And we're all  
24 thankful.

25 Your Honor, just to pick back up where I left off,

1 so this pricing is done based on the products purchased. It's  
2 not based on something -- on an alleged lack of competition in  
3 self-funded versus fully funded, not at all. And our expert,  
4 whose name is Ugo Okpewho -- and he has given us permission to  
5 just call him Ugo -- if we had more time, I'd tell you how he  
6 got to immigrate here when his dad was hired as a professor at  
7 Harvard.

8 But in any event, Ugo will testify about how this is  
9 all price and what the pricing mechanisms are and how you have  
10 to include all the claims costs for both fully insured and  
11 self-funded because that's the only way you can get a fair  
12 analysis. And that's the premium analysis that's identified in  
13 the BDO expert reports. There's no difference in the way that  
14 they price self-funded versus fully insured other than the risks  
15 involved to Blue Cross for carrying fully funded business in the  
16 sense that they -- Blue Cross builds in what's called a  
17 retention in order to preclude them from being harmed if they  
18 have to pay additional claims in excess of what the fully  
19 insured premiums have been.

20 That's the difference. That's the primary driver of  
21 difference in prices for both types of plans. It has nothing to  
22 do with the lack of competition in one area versus the other.  
23 And he is prepared to testify and will testify this afternoon  
24 that in his 12 years at Blue Cross, at no time did they factor  
25 in competition in one area versus another in how they priced

1 products. And they priced the same types of products for both  
2 types of plans. They price for --

3 THE COURT: But doesn't that go to potential for  
4 success on the liability issue?

5 MR. MULLINS: No. I think it goes directly to the  
6 damages allocation.

7 THE COURT: No. What's the first thing you've got to  
8 do before you get a damages award?

9 MR. MULLINS: You have to find liability.

10 THE COURT: Yes.

11 MR. MULLINS: Right.

12 THE COURT: So doesn't it go -- so if there's more  
13 competition for national accounts -- I'm sorry -- more  
14 competition for ASOs -- and less competition, that's something  
15 that you'd have to consider in assessing what damages were  
16 because the first component is trying to find are you going to  
17 succeed on the merits.

18 MR. MULLINS: Right. And to that point, Your Honor, at  
19 page 53 of their September 3rd filing, which was their motion  
20 for final approval of settlement agreement and certification of  
21 class, at page 53, they said the same conduct applied to both  
22 types of plans. And they identified a couple of additional  
23 items of conduct that applied to the self-funded plans. So in  
24 their own briefs, they've admitted that the same conduct  
25 applied.

1           THE COURT: Well, you know, again, this is not merits  
2 issues. So I'm less concerned with what everybody is saying and  
3 more concerned with just trying to isolate some commonsense  
4 applications here. And I'm asking you about, I think, a fairly  
5 commonsense thing.

6           MR. MULLINS: Well, the only evidence that we've been  
7 able to see in the pleadings that we have and the filings that  
8 we've had where this alleged difference in competition has been  
9 described based -- you know, in preparation for today is from  
10 one of Dr. Mason's reports where he talks about the different  
11 levels in competition. Other than that, we haven't seen what  
12 evidence there is of that. And we know something about  
13 Dr. Mason. He doesn't know about the health insurance.  
14 Economics, yes; but he doesn't know how health insurance  
15 products are priced and what goes into that. And in order to  
16 find --

17           THE COURT: So your argument goes to one of the four  
18 analyses; correct?

19           MR. MULLINS: No. That's incorrect, Your Honor.

20           THE COURT: Okay. So explain that to me.

21           MR. MULLINS: And so our -- we have challenged all four  
22 of his analyses in both reports that have been submitted,  
23 directly taking him on on all four of them. And Ugo is prepared  
24 this afternoon to describe why we disagree with each of his four  
25 analyses.

1 THE COURT: Okay.

2 MR. MULLINS: The primary one -- the primary reason on  
3 all of his analyses is in order to fairly compare the two  
4 different types of plans for a damage allocation -- here, the  
5 allocation of how we're going to divide the settlement funds --  
6 is based on the risks involved to the plans. And when you do  
7 that, it's not 93 and a half to six and a half.

8 A fair -- that's a shocking allocation, by the way, to  
9 people in the industry, to the people we've been talking to.  
10 They saw that and they couldn't believe it because there is so  
11 much more that goes into the ASO side of the business than just  
12 this ASO fee. You have to include all the other products that  
13 go along with ASO services.

14 THE COURT: For example?

15 MR. MULLINS: So there's -- there's a list of about 14  
16 items, and they're all described in our expert reports in our  
17 filings. But there's stop-loss insurance, there's actuarial  
18 services, there's pharmacy benefits that Blue Cross provides.  
19 There is rebate issues. There's all kinds of things. There's  
20 about 14 or 15 of them. And every single one of those applies  
21 to the fully insured, and every single one of those is available  
22 to self-funded. Some purchase some; some purchase all. But  
23 they're all there. And you have to account for every single one  
24 of those items that is paid for by the self-funded.

25 So the way they do that in the industry is they say,

1 okay, we're going to put them on a premium equivalent basis.  
2 We're going to take the fully insured, and we know that 85  
3 percent of the fully insured premium is a pass-through. It  
4 either has to be paid out in claims or rebated to the employer.  
5 Under the Affordable Care Act, that's the law.

6           On the self-funded, they say, okay, we're going to put  
7 them on a premium equivalent basis by understanding the amount  
8 of claims that the employer believes they're going to pay. And  
9 there are actuarial calculations that go into all that. Then  
10 they take the ASO fee itself, which is not large, and then they  
11 add in all of these extra services that are purchased by the ASO  
12 plans, by the self-funded plans. And they take those costs and  
13 they see what the -- then they compare what the costs really  
14 look like. And it's not on the 85 versus 85, because that money  
15 goes someplace else.

16           THE COURT: And this is what your expert is going to  
17 tell me?

18           MR. MULLINS: Absolutely. And those are --

19           THE COURT: Okay. Does he need to tell me that if I  
20 understand that?

21           MR. MULLINS: It's in our reports. And we're prepared  
22 to submit our reports to --

23           THE COURT: Is he going to tell me anything that's not  
24 in your report?

25           MR. MULLINS: He can talk about some of his experiences



1 at Blue Cross that's not in the report that will explain exactly  
2 what I'm telling you now, Your Honor. And that includes --

3 THE COURT: Kind of anecdotal that prove the point?

4 MR. MULLINS: Absolutely. And he's got 20-plus years  
5 in the business. He has dealt with the exact issues we're  
6 dealing with today since he started in the business. He is at  
7 the highest level of actuarials in the country. He deals with  
8 employers today. He dealt with employers when he was at Blue  
9 Cross for 12 years. He knows what he's talking about. He knows  
10 what goes into all of these things we're talking about and what  
11 the distinctions are and why this notion of competition and how  
12 it affects the pricing is meaningless in terms of pricing  
13 differences.

14 Now, the thing about the competition and does that  
15 impact liability, what I would say to that is we don't think so.  
16 I've already explained what they've said in their brief about  
17 the same conduct applying to both types of plans in addition to  
18 some additional things that apply to the self-funded.

19 But what we're talking about here is allocating a  
20 settlement fund. Everybody agrees that these plans were all  
21 damaged by the Blue Cross conduct. How do we allocate those  
22 damages? Well, we know the conduct was the same. Now we can  
23 tell you what the pricing differentials are and why that  
24 happens. And it's a risk factor. It's not a lack of or more  
25 competition or anything like that. It's risk of Blue Cross,

1 primarily, for why they price them differently.

2           So what's a fair allocation based on that? The ranges  
3 are in Ugo's report. Those are based on industry standards.  
4 Those are based on his 22-plus years' experience of working both  
5 sides of the fence. And it's not six and a half to 93 and a  
6 half. It is -- depending on time frame that we're talking  
7 about -- we've got the statute of limitations issues that you've  
8 already addressed with Mr. Richie. We've got that issue and  
9 we've also got, okay, earlier in the period, if we're talking  
10 about going back to 2008 for a damages period, probably more  
11 like 50-ish percent were self-funded, 50 percent of the lives  
12 were fully funded. Over time, that's changed to more like 60  
13 percent self-funded lives versus 40 percent fully insured lives.

14           So depending on time frame and number of lives, the  
15 spread is different. It's about 23 percent up to 54 or 55  
16 percent that should go to the self-funded class on a fair  
17 allocation, not 93 and a half percent to the fully insured.

18           It's simply not reasonable what has been presented to  
19 the Court in terms of an allocation percentage. That's why  
20 we're here. We haven't objected to anything else. But this  
21 allocation percentage really was shocking to people in the  
22 industry who know what's going on.

23           THE COURT: Thank you.

24           MR. MULLINS: You're welcome.

25           THE COURT: Mr. Burns.

1 MR. BURNS: Can I be heard, Your Honor?

2 THE COURT: You may.

3 MR. RICHIE: Warren, can I just move my stuff out of  
4 the way? I won't even interrupt you.

5 MR. BURNS: I was going to draw on it.

6 MR. RICHIE: Well, if you want a coloring sheet, I can  
7 bring one for you.

8 MR. BURNS: Don't tempt me.

9 Your Honor, I'd like to ground us for a second. So I  
10 think, first of all, we started with statute of limitations.  
11 We've moved back into allocation a little bit. So I want to  
12 cover both, but I'm going to start with the allocation since  
13 it's freshest and just based on the arguments we heard.

14 Your Honor, it's our contention their expert,  
15 respectfully, Mr. Ugo -- and unfortunately, I can't pronounce  
16 that name, and so I will take the invitation to --

17 THE COURT: I think he's given you the permission.

18 MR. BURNS: I will take the invitation.

19 But fundamentally here, our expert, Dr. Mason, has been  
20 qualified as an antitrust economist. And Mr. Ugo -- it's like  
21 they're talking Greek and Latin; and, you know, pick the  
22 language for each.

23 Where Mr. Ugo's expertise and testimony might be  
24 relevant is if he got on the stand and I was able to say to him:

25 Mr. Ugo, when you were pricing your Blue Cross fully

1 funded and self-insured plans, how much of an overcharge did you  
2 build into the self-funded plan? \$10.

3 How much of an overcharge did you build into the fully  
4 funded -- or fully insured plan? \$34.

5 All right. Pricing is different than determining an  
6 overcharge in an antitrust case. And of course Mr. Ugo is not  
7 going to come here to testify to that. If he did, I think he'd  
8 have lawyers scattering for the doors and we'd probably want to  
9 get this settlement approved. But there are fundamental  
10 distinctions between what they have done with their expert --  
11 and I'm not here to quibble. He has a lot more experience in  
12 pricing than I do. But he doesn't have the experience that  
13 Dr. Mason has in actually looking at issues that are relevant to  
14 the case, including the ability of these two markets to bear an  
15 overcharge and then saying what's a reasonable allocation.

16 Now, back to statute of limitations, which begs the  
17 broader question, Your Honor is absolutely right. The broader  
18 question is whether -- how the self-insureds -- how the ASOs are  
19 treated by the settlement is fair and reasonable and equitable.  
20 That inquiry is broader than just statute of limitations. I  
21 would submit to you that as it relates to these arguments, it  
22 pertains to both amount and the claims period at issue in the  
23 case. But all of this is interwoven, and it was interwoven in  
24 the context of negotiations in this case.

25 And what I think the Court needs to understand and

1 think about in terms of the reasonableness of this allocation is  
2 that, one -- let's start with claims period. Yes, we had  
3 diametrically opposed views on what the appropriate look-back  
4 period was for these two -- for the subclass and the  
5 subscribers' class. And yes, we argued about that. And yes, we  
6 talked about it with Mr. Feinberg.

7           Now, I'll tell you, Your Honor, I mean, I looked at  
8 these issues and I argued from a perspective that's largely been  
9 the objectors' argument. I may have reached a different  
10 conclusion about the ability to succeed on those arguments. But  
11 that, in turn, points to the reasonableness of the settlement.  
12 If there's a dispute, if there's a valid, rational dispute, then  
13 how we ultimately resolve it points to the reasonableness  
14 because we've taken it into account. And that's certainly  
15 occurred here.

16           Second, I would say look at the actual claims period we  
17 got for the ASOs in this case. Now, ordinarily, as Your Honor  
18 is well aware, four-year look-back period on antitrust claims.  
19 And there was a contention at various points that that was what  
20 we were entitled to. We got a five-year look-back period. Why?  
21 How? Because I argued for it and said at a minimum, we needed  
22 that for the claims period, largely because I became involved  
23 before we actually filed the complaint. And I said, there's no  
24 way I'm going to agree to a four-year look-back from the date of  
25 the complaint I file when I've been involved for longer than

1 that period. The class needs more than that, deserves more than  
2 that. I got it. That was part of the negotiations we conducted  
3 and agreed to.

4           Second, on the amount, Your Honor, I was aware of the  
5 issues regarding class period. I argued them, as I said. If  
6 Your Honor looks at the amount that was agreed to here, six and  
7 a half percent, and then looks at the financial analyses that  
8 Dr. Mason has conducted, it's nearly double the low end of the  
9 range in -- let me say it differently. In the most robust of  
10 Dr. Mason's economic analyses, okay -- and that's the  
11 revenue-per-member growth -- the six and a half percent we  
12 actually obtained was nearly double, somewhere between 50  
13 percent to a hundred percent higher than what the low end of  
14 those ranges was. It was one of the reasons I was pushing for  
15 additional money, pushing for additional dollars to come into  
16 the ASO class.

17           And if you're judging the reasonableness of that six  
18 and a half, even if you look at the shorter class period, you  
19 have to say that the economic analyses that have been presented  
20 by an antitrust economist in this case fully support a six and a  
21 half allocation given that entire context.

22           So when you look at the settlement as a whole as it  
23 pertains to the ASO class and you take into account the value  
24 from the injunctive relief as well -- because that's out there  
25 too -- I submit it's nearly impossible to say this isn't a

1 reasonable and fair settlement under the circumstances.

2 THE COURT: All right. Are we ready to start calling  
3 some witnesses back?

4 MR. BURNS: Yes, Your Honor.

5 THE COURT: Now, with Dr. Mason, do we need Dr. Mason  
6 back on the allocation issue?

7 MR. RICHIE: Yes, Your Honor. I promised you two  
8 doublings. I only got to talk about one of them. The other one  
9 relates directly to Dr. Mason's report.

10 THE COURT: I'm sorry. What did you say?

11 MR. RICHIE: Forgive me, Your Honor. I promised you  
12 that I could double the amount that was due to the self-funded  
13 subclass. One of them deals directly with Dr. Mason's  
14 testimony.

15 THE COURT: All right. So we're ready to call him  
16 back?

17 How much time do you need, Mr. Richie, to double?

18 MR. RICHIE: Your Honor, I can -- well, it depends on  
19 what he says, but ten minutes.

20 THE COURT: All right.

21 You're still under oath.

22 THE WITNESS: Thank you.

23 **JOSEPH MASON, Ph.D.**

24 The witness, previously having been sworn, resumed the stand and  
25 testified further, as follows:

1 CROSS-EXAMINATION

2 BY MR. RICHIE:

3 Q. Dr. Mason, my name is Thomas Richie. I represent some  
4 objectors in this case. Do you still have a copy of your report  
5 in front of you?

6 A. I do.

7 Q. Thank you. If you would turn with me to page 10 of that  
8 report. I'm going to speak with you about paragraphs 33 through  
9 35. Please let me know when you're there.

10 A. Okay. I'm there.

11 Q. So we can start off with the scale of the issue. The  
12 principle you articulate in these paragraphs has the net effect  
13 of reducing the allocation to the self-funded subclass by 50  
14 percent; correct?

15 A. Well, my opinion is in fact more than 50 percent, but 50  
16 percent is a conservative, small adjustment.

17 Q. Okay. As you performed the math throughout your report, you  
18 used 50 percent; correct?

19 A. That's correct.

20 Q. We'll start with paragraph 33. You know what? I'm actually  
21 going to skip that.

22 Let's talk about what a discount rate means generally. As I  
23 understand it -- and correct me if I'm wrong -- you used the  
24 term "discount rate" and a concept of a discount rate to account  
25 for the delay that would occur in the self-funded subclass



1 obtaining a money judgment in this case; is that correct?

2 A. I think that's about correct. The way I think of it is that  
3 if the self-funded subclass filed a suit today, they could  
4 expect to be roughly eight years behind this suit as it  
5 currently stands for which we're currently discussing  
6 settlement.

7 Q. Okay.

8 A. So to reach a settlement in that suit eight years later, the  
9 time value of the money received would be discounted today by a  
10 discount factor that, according to a 9 percent cost of capital,  
11 which is the typical cost of capital for a corporate firm, a  
12 discount factor of 50 percent.

13 Q. Okay. And so the principle here is that the self-funded  
14 subclass is eight years away from a judgment. So we have to  
15 discount the cost of capital it's going to take to reach the  
16 time of that judgment. Again, is that generally correct?

17 A. We're not discounting cost of capital.

18 Q. So are we using --

19 A. We're discounting an expected future cash flow.

20 Q. Okay. You heard yesterday testimony about -- excuse me --  
21 lawyer argument about how long it would take for the fully  
22 insured class to obtain a judgment in this case; correct?

23 A. I recall discussing a judgment, but here we're discussing a  
24 settlement.

25 Q. Okay. Well --

1 A. So I'm not sure what the equivalence is.

2 Q. But for the discount rate, we were talking about judgment;  
3 correct?

4 A. No.

5 Q. So you weren't discounting to the date of an anticipated  
6 future judgment?

7 A. No.

8 Q. Okay. What were you discounting to?

9 A. Apologies if I misspoke earlier. I don't think I said that.  
10 I'm discounting --

11 THE COURT: Speak up a little bit. I'm having trouble  
12 hearing you.

13 A. I'm discounting to a stage of the litigation --

14 Q. Okay.

15 A. -- similar to this stage, at which we are negotiating a  
16 settlement. With regard to this litigation currently before us,  
17 eight years have elapsed to get us to this stage where we are  
18 talking about a settlement that amounts to something on the  
19 order of \$3 billion, roughly, on claims estimated by Dr. Pakes  
20 in his declaration to be somewhere in the order of 18 to \$36  
21 million if this was to go to judgment and plaintiffs were to  
22 prevail.

23 So even in this litigation, there is a discount in the  
24 settlement. And my point is that if we engaged in a similar  
25 exercise of starting a lawsuit today and eight years later

1 reached a point where we were talking about a settlement, the  
2 value of that money that might be recovered in such a settlement  
3 eight years later, just the time value of the money, not the  
4 risk of the litigation and the other milestones involved --

5 Q. Okay.

6 A. -- would be assessed a 50 percent discount factor by  
7 standard financial math.

8 Q. By what amount do you discount the claims of the fully  
9 insured class?

10 A. Well, the claims of the fully insured class, as I said, are  
11 already discounted by an amount of up to 90 percent of the  
12 judgment that might occur sometime in the future, as estimated  
13 by Dr. Pakes. I don't need to discount that further. They have  
14 been involved in the litigation for eight years. They started  
15 eight years ago.

16 The way I think of this is I'm looking at a but-for world  
17 where the self-funded claimants pursued their own litigation.  
18 And the savings derived from participating in this litigation,  
19 coming in late to the game, so to speak, for whatever reason, as  
20 discussed earlier today, but taking on their face what's been  
21 represented about their participation in the case today.

22 Q. So just so we're clear, you don't discount -- you don't  
23 apply any discount factor in your analysis to the claims of the  
24 self- -- excuse me -- to the fully insured subclass?

25 A. Well, no. They don't -- they started when they started.

1 Another way to think of this is what would -- the easiest way to  
2 think of it is they started -- self-funded started eight years  
3 later. To put things on an apples-to-apples basis, we have to  
4 discount what they're getting for starting eight years later for  
5 those eight years.

6 Q. And you're aware that -- as an economist that -- well, not  
7 even as an economist. As someone who was sitting in court  
8 yesterday, you're aware that counsel for the class is being  
9 compensated for the risk that they took; correct?

10 A. I heard that. This is not about the risk that counsel took,  
11 although I suppose that's another way to think about it, that  
12 the self-funded class is getting this settlement without risk.

13 Q. So --

14 A. But we're not talking about the risk that's been undertaken  
15 by counsel and investment of attorneys' fees along the way, just  
16 that they didn't -- they're coming in having the benefit of  
17 sitting through what I refer to in paragraph 33, more than 30  
18 hearings and status conferences and other milestones at which,  
19 potentially, this case could have ended right there.

20 Q. Are you aware that the recovery of the self-funded subclass  
21 is being reduced in any amount by the payment of attorneys' fees  
22 in this case?

23 A. I know generally that's the case -- well, I'm sorry. The  
24 self-funded subclass? I'm not sure how that's allocated across  
25 classes. I guess I'd have to say I don't know.

1 Q. Would that be relevant --

2 A. I understand fees are there somewhere.

3 Q. Would that be relevant at all to your analysis, something  
4 you would consider in your expertise?

5 A. I don't look at the imposition of attorneys' fees. I  
6 understand that is a matter for the Court.

7 Q. But you wouldn't look at differential loading of those fees  
8 on classes if you were determining an allocation and applying a  
9 discount factor?

10 A. You'd have to explain to me the relevance for including such  
11 fees. I don't see it on its face. The fees are the fees.

12 Q. Okay. But differences in how those fees are allocated is  
13 totally irrelevant to you right now is what you're telling me?

14 A. I don't see the relevance sitting here. I've been asked to  
15 compute a relative incidence of overcharge in this matter by  
16 which to base a reasonable settlement allocation. I focus on  
17 overcharge, not so much on attorneys' fees.

18 Q. But, in fact, you don't perform an overcharge analysis, do  
19 you, Dr. Mason?

20 A. Oh, that's absolutely false.

21 THE COURT: I think we just went past the ten-minute  
22 mark.

23 MR. RICHIE: Well, I wasn't expecting --

24 THE COURT: No. I'm talking about based on the answer  
25 to that question.

1 MR. RICHIE: Thank you. Give me just a second, Your  
2 Honor.

3 (Brief pause)

4 Q. Let's turn to your report, page 11, paragraph 30. Sorry.  
5 That's not on page 11. Paragraph 30 appears on page 9. And I  
6 will read this. Tell me if I read it correctly. It's from the  
7 bottom of paragraph 30.

8 I do not possess specific measures of such overcharges for  
9 each licensee, nor have I been instructed to estimate overcharge  
10 for each licensee.

11 Did I read that correctly? It's the next-to-last sentence.

12 A. I would like that read in the context of paragraph 30, if I  
13 can -- it's in print. If the Court would like to save time, I  
14 don't need to go through it, but --

15 THE COURT: Give us the context.

16 THE WITNESS: Paragraph 30 reads in whole: From an  
17 economic perspective, one would expect the apportionment of  
18 settlement proceeds between the subscriber class and the  
19 self-funded subclass to reflect the relative share of  
20 overcharges borne by fully insured and ASO plans respectively  
21 during the relevant class periods. The theory of damages in  
22 this matter is grounded in the alleged impact of the horizontal  
23 restraints on entry maintained by defendants which resulted in  
24 certain overcharge assessed by the licensees.

25 Here's your passage.

1 Q. Okay.

2 A. I do not possess specific measures of such overcharges for  
3 each licensee, nor have I been instructed to estimate overcharge  
4 for each licensee. My analysis is, therefore, based on proxies  
5 for such overcharges.

6 I explain further about such proxies in paragraph 31. But  
7 at all points my analysis is targeted to the overcharges, not --

8 THE COURT: Would you explain to the Court what you  
9 mean by each licensee? When you say I have been instructed --  
10 I've not -- nor have I been instructed to estimate overcharge  
11 for each licensee, define "each licensee."

12 THE WITNESS: So, for instance, Dr. Pakes undertook a  
13 damages analysis in this matter for the State of Alabama. I  
14 have -- I say elsewhere in my report I understand that the  
15 data or similar data used by Dr. Pakes in order to take -- that  
16 could be used to undertake such an analysis for all of the 36  
17 market areas does not exist. So when I talk about each  
18 licensee, I'm talking about each of the 36 areas.

19 And I found it interesting that a BCBS representative  
20 said earlier something to the effect of if you understand one  
21 BCBS plan, you understand one BCBS plan, which struck a  
22 resonance with me with regard to that data availability and  
23 ability to replicate Dr. Pakes' analysis another 35 times.

24 Q. So if I understand you correctly, Dr. Mason, your opinion  
25 today is what it says in your report at paragraph 12 that

1 there's no data sources, studies, or analyses that exist that  
2 quantify the overcharges borne by the subscriber class and/or  
3 the self-funded subclass?

4 A. I'm sorry. Let me get to paragraph 12.

5 Q. Certainly.

6 A. All right. I didn't have it before me to -- for the  
7 accuracy of your statement. But paragraph 12 reads --

8 Q. Fair enough.

9 A. -- no data sources, studies, or analyses exist that quantify  
10 the overcharges borne by the subscriber class and/or the  
11 self-funded subclass. I utilize information produced in this  
12 matter in conjunction with relevant academic literature,  
13 industry commentary, and my economic expertise to form an  
14 opinion on the reasonability of the settlement allocation and  
15 injunctive relief provisions upon which I opine.

16 I'd also like to point the Court to paragraph 31, which  
17 followed paragraph 30, which we previously read from, which also  
18 explains my strategy in generating proxies for overcharges  
19 seeking measures that get closer and closer to the overcharge in  
20 this matter. Again, I won't read it and bore the Court with  
21 what's already there.

22 Q. So, Dr. Mason, I'm having a hard time. Have you performed  
23 an overcharge analysis? Yes or no.

24 A. Sure. My analyses are always targeted toward overcharges.  
25 And that is my chief objection to objectors' quibbles about one



1 of my approaches, a gross revenue approach, which is also the  
2 most distant from an overcharge concept.

3 I perform a gross revenue comparison, then I perform a net  
4 revenue comparison, which, according to Ms. Corley, is a valid  
5 approach and addresses properly objectors' main complaint that  
6 claims payments are included for fully insureds and not for  
7 self-funded. The solution to that is not to add in something  
8 artificial to self-funded. It is to take out claims paid from  
9 fully insureds.

10 But then I go on to undertake a relative profitability  
11 analysis as well as an analysis of changes in net revenues,  
12 which reflect changes to the prices that were discussed with  
13 regard to Mr. Ugo, changes of which are indicative of the  
14 relative market power.

15 Since the beginning of this class, the group with the higher  
16 market power has raised prices by more than the group with the  
17 lower market power, quite simply. That analysis has received no  
18 reply whatsoever from objectors save for a statement that they  
19 found it confusing.

20 Again, the style of analysis is a style of economic analysis  
21 that has been of growing importance in the field of economics  
22 for the last 30 years and for which, just this month, three  
23 individuals and one posthumously -- not really posthumously, but  
24 many people do like the origins of this with them -- was awarded  
25 the Nobel Prize. So for objectors' experts to say they find

1 this difficult to follow I find unfathomable.

2 I have four analyses, only one of which is really objected  
3 to, the one furthest from the concept of overcharge.

4 Q. So was that a yes or a no?

5 A. I can repeat it back if you'd like.

6 THE COURT: I'm not a jury.

7 MR. RICHIE: Okay.

8 THE COURT: This is not helpful. I understood his  
9 answer.

10 MR. RICHIE: Okay. Yes, Your Honor.

11 Q. You undertook an analysis --

12 THE COURT: And let me make sure I understood your  
13 answer. What you're saying is you don't have the data for each  
14 licensee, and it would be difficult to acquire the data for each  
15 licensee. And therefore, you used proxies for the data to  
16 inform your analysis. Is that a layperson's explanation of what  
17 you did?

18 THE WITNESS: Yes, with only one minor correction.

19 THE COURT: And I'm glad to be corrected by someone  
20 smarter than me.

21 THE WITNESS: Only in a certain very narrow area,  
22 potentially.

23 Such data is not only unavailable to me, in some cases,  
24 it doesn't exist. Dr. Pakes, just by way of comparison and the  
25 simplest explanation, derived his overcharges from his report on

1 Alabama by undertaking something fairly similar to an event  
2 study, looking at what happens to prices when there is entry.  
3 So he doesn't have overcharge either.

4           It's difficult to look at profits and say how much of  
5 that profit is overcharge and how much is legitimate. And as  
6 objectors have noted, if you start going down an accounting  
7 rabbit hole, it might -- it doesn't really lead you anywhere  
8 because in economics, as I said earlier -- and in real life --  
9 it's not illegal to make profits. But there's an amount of  
10 profit that we consider overcharge that comes about from market  
11 power. We're trying to tease out what is that extra amount.

12           Now, when I'm saying I haven't undertaken an overcharge  
13 analysis, I mean I haven't gone through all 36 market areas.  
14 But I'm doing the same thing Dr. Pakes is doing. I'm trying to  
15 get closer and closer to that overcharge. In my last method of  
16 looking at the changes and inflation-adjusted net revenue over  
17 time from the beginning of the class period where it's not  
18 alleged there was any market power, I find that the price of  
19 fully insured coverage rises by a lot more than the price of the  
20 self-funded coverage, which, to me, is indicative of the market  
21 power -- the greater market power in the fully insured area.  
22 And by such ratio, I'm able to look at the ratio of market power  
23 between the two areas and utilize that in my assessment of an  
24 appropriate settlement multiple in this matter.

25           THE COURT: Thank you.

1 MR. RICHIE: Your Honor, I'm going to assume your  
2 permission to approach still stands.

3 THE COURT: You may. And you need not ask.

4 MR. RICHIE: Thank you. Your Honor, copies for you.

5 THE COURT: Thank you.

6 MR. RICHIE: Some of this is duplicative, but...

7 THE COURT: This is just his expert report and another  
8 couple of documents?

9 MR. RICHIE: The exhibits to his expert report, Your  
10 Honor, which were filed under seal.

11 THE COURT: Yes. And the declaration of Mr. Feinberg?

12 MR. RICHIE: Yes, Your Honor.

13 THE COURT: Thank you.

14 Q. (Mr. Richie, continuing:) A couple of questions about --  
15 we'll start with the declaration of Mr. Feinberg. I'm going to  
16 be asking questions --

17 A. If I can -- if I may for just a moment. I'm sorry.

18 Q. Yes.

19 A. I would like to clarify something that was said earlier  
20 before I got on the stand. Another attorney from your firm, I  
21 believe, said that I issued two reports in this matter. I did  
22 not. This is the only report that I've issued in this matter.

23 Q. Thank you. I was actually going to ask you that. Prior to  
24 September 2020, have you issued any formal report in this  
25 matter?

1 A. No, I have not.

2 Q. Okay. Have you reviewed the Burns memo that he referred to?

3 A. I've seen it in preparation for today. I believe you  
4 attached it to some materials that you sent along.

5 Q. And did you generally -- did it generally accurately reflect  
6 your opinions in this matter?

7 A. I didn't really look at it for that purpose. I was  
8 surprised that your experts misattributed quotes from that  
9 report to me and alleged those were my arguments. I didn't  
10 review it for accuracy. No.

11 Q. Okay.

12 A. I presumed that Mr. Burns accurately represented what I was  
13 doing today. In fact, including the various methods that I  
14 applied here, which were certainly more than one at that point  
15 in time.

16 Q. Thank you. Let's look at paragraph 12 of Mr. Feinberg's  
17 declaration.

18 Some background. Were you present at any sessions with  
19 Mr. Feinberg?

20 A. What do you mean by "sessions"?

21 Q. Did you ever meet Mr. Feinberg face to face?

22 A. I recall I was on a Zoom call where Mr. Feinberg was there.  
23 I don't know if that was a session in any sense of the word.

24 Q. I don't mean it in a technical sense. I meant have you met  
25 the man. I guess by a Zoom call. About how many times did you

1 speak on Zoom with him?

2 A. I'm not sure I spoke on Zoom with him during that call.

3 Q. Okay. No. I didn't mean to put words in your mouth. Thank  
4 you.

5 A. That's the only one I remember. Yes.

6 Q. Okay. So other than that one time where you may or may not  
7 have spoken, you do not recall communicating with him orally?

8 A. Yeah. I don't recall having any direct conversation with  
9 him during that call.

10 Q. Do you recall sending him any written materials? I'm not  
11 asking what they said, just do you recall sending them.

12 A. No. Certainly not directly. I never had any direct  
13 communications with Mr. Feinberg.

14 Q. Okay. Did you ever receive any feedback about concerns that  
15 Mr. Feinberg had in connection with the mediation? And again,  
16 I'm not asking for the substance of those concerns, just, you  
17 know, did someone ever tell you the mediator is interested in  
18 this point?

19 A. Not that I recall. No.

20 Q. And do you have any reason to believe that Mr. Feinberg's  
21 description of the mediation contained in paragraph -- or at any  
22 point in his declaration, but specifically in paragraph 12, is  
23 incorrect?

24 (Brief pause)

25 A. Okay. Now that I've read that paragraph, can you please ask

1 that question again?

2 Q. Yeah. Do you have any reason to disagree with how  
3 Mr. Feinberg has summarized the course of the mediation?

4 A. I have no reason to disagree with anything in paragraph 12,  
5 no.

6 Q. Thank you. That's my only question about that document.  
7 I'm now going to turn to the packet of your exhibits.

8 MR. RICHIE: And, Your Honor, I understand all of these  
9 documents to already be in the record, so I'm not separately  
10 marking them as exhibits.

11 THE COURT: Say that again.

12 MR. RICHIE: I understand that all of these documents  
13 are already in the record. I'm not separately marking them as  
14 exhibits.

15 THE COURT: That's fine.

16 Q. I want to speak with you in general so we can see how these  
17 documents fit together as what you referred to as a proxy for an  
18 overcharge analysis, or building up towards one.

19 You use some documents that you say you received from the  
20 defendants in preparing these exhibits; correct?

21 A. Are you pointing to a specific passage here?

22 Q. Just the -- I'm referring generally to these printouts and  
23 spreadsheets that you prepared and attached as exhibits to your  
24 report. They're full of numbers. Most of the data in these  
25 spreadsheets came from documents you received from the

1 defendants; is that correct?

2 A. Well, the source of the data is listed in footnote 54 of my  
3 report. This is the text that I did represent earlier was  
4 repeated verbatim in the Burns memorandum.

5 Q. Okay.

6 A. And this is the paragraph that describes the data. That's  
7 why I was so surprised that objectors claimed they had no idea  
8 where I got the data from.

9 Q. And you don't attach any of these financial and membership  
10 data -- you don't attach the sources to your report, do you?

11 A. I don't attach the sources to my report?

12 Q. Yeah. The underlying quarterly financial reports and  
13 quarterly enrollment reports, you haven't provided that to the  
14 Court, have you?

15 A. I received them from BCBS. I'm not sure the degree to which  
16 they're protected. The attorneys have them. And to the extent  
17 that they're available to others, I'm sure they would be willing  
18 to pass them along.

19 Q. What other information, if any, did you receive from the  
20 defendants in this case? Directly from the defendants, I mean,  
21 not through a database of discovery information.

22 A. Direct? I don't know. There could have been more. I never  
23 thought about such distinction before.

24 Q. Okay. How about in the database? What kinds of documents  
25 did you look at?



1 A. I cite here internal BCBS presentations of relative  
2 profitability of fully insured and self-funded accounts. Those  
3 come to mind. I'm sure there are others.

4 Q. But you're referring to the two documents, one of which you  
5 used as the basis for the 6 percent, the other you used as the  
6 basis -- or sorry -- six times over, and the other you used as  
7 the source for ten times over.

8 A. Sure.

9 Q. Okay. Other than those two documents -- they're listed by  
10 Bates number. Other than those two and then these quarterly  
11 financial and enrollment reports, anything else that you  
12 reviewed?

13 A. Oh, what did I review? That's another question.

14 Q. I'm sorry. Specifically from defendants.

15 A. There was a great deal of material reviewed. But what was  
16 cited in my report, those are the things that come to mind. I  
17 typically cite things by Bates number if they're from the  
18 record, so that would be indicated in my report.

19 Q. Let's talk about the second line -- excuse me -- the second  
20 row of Exhibit 1. It says self-funded revenue. Please tell us  
21 exactly what that line -- that row includes.

22 A. So to, in part, link to your prior question, we received a  
23 great deal of material from -- we had full access to the  
24 Relativity database of all discovery material in this matter.  
25 As you noted, I also received material from BCBS in this matter.

1 The BVA Group represents about 15 experts, and we have staff of  
2 35 to 40 analysts, all -- many of whom -- a large team of whom  
3 were involved in understanding the discovery materials and  
4 understanding what was in the record that could lead -- or  
5 contribute to our analysis in this matter.

6 What we have before us here, as reflected in the description  
7 in footnote 54 and also, as I noted, verbatim in the Burns  
8 memorandum, is data from the quarterly financial reports, which  
9 we were instructed identify the revenues that are subject to the  
10 horizontal restraints alleged in this matter. We have before us  
11 in line one the insured premium revenue, which is a defined term  
12 in those reports.

13 Q. I don't mean to cut you short. I was really just asking  
14 about line two, the second row. All my question was just tell  
15 me precisely what that second row includes.

16 A. Well, one cannot understand what the -- I'll go back to  
17 footnote 54 since you seem to be a little bit behind the eight  
18 ball here. I'll read it directly.

19 The QFRs provide fields labeled Premium Revenue, Gross  
20 Revenue Included Self-Funded, and Net Revenue. A note in the  
21 report explains that, quote, gross revenue includes fully  
22 insured premiums and premium equivalents for self-funded  
23 business. Net revenue is net of self-funded benefit payments.  
24 I use the premium revenue as the gross revenue for fully insured  
25 plans and calculate the revenue for self-funded plans as the net

1 revenue less the premium revenue, in parentheses, i.e., the  
2 component of net revenue that is not attributable to fully  
3 insured plans.

4 That is what I call self-funded revenue. And contrary to  
5 what objectors perpetuate in their filings, that is not limited  
6 to ASO fees.

7 Q. Exactly. I would like for you to tell me everything that's  
8 included in that number.

9 A. I am not the expert on this data. I think that question  
10 would be better posed to BCBS representatives. This footnote,  
11 as I noted, was included verbatim in the Burns memorandum and  
12 was transparent since July of this year.

13 Q. Yes.

14 A. And my understanding is no one has asked for the data. No  
15 one has asked any questions about the data. No one has even  
16 acknowledged this approach. Merely there's been an assumption.  
17 And objectors have stated in the report that it is an assumption  
18 based on what they consider to be a lack of detail in my report  
19 about where my data came from that this self-funded revenue  
20 merely consists of ASO revenues.

21 Q. The people that --

22 A. But if one has questions about the BCBS data -- and  
23 specifically, are there particular items in that data -- I would  
24 direct them to the BCBS representatives that we also spoke with,  
25 which were very helpful and answered every question we had,

1 and they can tell you exactly what's in the data.

2 Q. So --

3 A. This data is the data that is directly associated with the  
4 horizontal restraints in this matter and, as I understand, is  
5 that which is directly related to the claims in this matter.

6 Q. Thank you. So you did not ask Blue Cross Blue Shield  
7 exactly what's included in self-funded revenue on the second  
8 line?

9 A. I did not need a laundry list of what's included. My  
10 understanding was this is the maximum amount of revenue that  
11 could be attributed to the self-funded revenue as represented in  
12 line two, and I was comfortable with that for purposes of my  
13 assignment. If objectors have questions, again, I would suggest  
14 that they reach out to attorneys in this matter and perhaps  
15 attempt to set up some communications with BCBS, who produced  
16 this data.

17 MR. RICHIE: Your Honor, I am considering whether it's  
18 the most efficient time now for me to propose the deposition I  
19 was speaking about earlier. I'm trying to ask --

20 THE COURT: We'll take that up at the end of the  
21 hearing. I'm not ready to make a ruling on that yet.

22 MR. RICHIE: Thank you. Should I continue? I have  
23 more questions on this matter, but I just -- I'm worried I'm  
24 not -- I'm trying to ask rifle-shot questions; I'm getting long  
25 answers. It's not the witness's fault, but we need to -- I want

1 to be respectful. And I don't want to keep going, but this is  
2 my only chance to talk to him.

3 THE COURT: Well, look, here's the deal. We've been at  
4 this for a day and three-quarters. If -- based upon the  
5 schedule, we have two hours left.

6 MR. RICHIE: Yes, Your Honor.

7 THE COURT: We have your expert that needs to go on.

8 MR. RICHIE: Yes.

9 THE COURT: Okay? We've spent a lot of time me trying  
10 to understand what your arguments were before we got to this  
11 point, and I think we got wrapped around the pole a few times  
12 there. That killed time. I think you've got five minutes to  
13 wrap it up with this witness.

14 MR. RICHIE: Yes, Your Honor. Thank you. I will --  
15 while I'm sorting out my questions and picking the best of the  
16 rest, I will lodge an objection. This is our sole chance, but  
17 I'm going to keep moving.

18 THE COURT: What objection are you lodging?

19 MR. RICHIE: This is our only chance to speak with this  
20 witness. I don't believe we've been given an adequate time. I  
21 object to the narrative answers I've been receiving. I've not  
22 objected to them to this point, but I would -- I'm trying  
23 to move as quickly as possible.

24 THE COURT: Okay. I'm overruling that objection. I  
25 don't think there's anything inappropriate about the witness's

1 answers to your questions.

2 MR. RICHIE: Thank you.

3 Q. You would agree, would you not, that large fully insured  
4 plans and ASO plans or self-funded plans are substitutes;  
5 correct?

6 A. Again, that's misquoting my report. My report characterizes  
7 them as imperfect substitutes.

8 Q. Okay.

9 A. Using almost the same description as the Court used in their  
10 April 2018 -- I'm sorry -- I'm not sure if it's a ruling or  
11 other document in this matter, but the Court's April 2018  
12 writing.

13 Q. You would agree that most large plans can self-fund;  
14 correct?

15 A. I don't think I disagree with that. Most large plans do  
16 self-fund.

17 Q. So a large fully insured plan has the choice to self-fund as  
18 a general matter.

19 A. I can't say what a large plan that self-funds' choice is.  
20 Generally larger firms tend to be the ones that self-fund  
21 because they have the financial capacity to do so and they have  
22 the ability to devote staff to monitoring that function, where  
23 smaller firms typically don't. Some small firms self-fund and  
24 some large firms don't self-fund.

25 Q. But it's their choice. It's not a lack of capacity. It's

1 not that they can't. It's that they choose not to.

2 A. Who's they?

3 Q. The firms themselves.

4 A. The large firms or the small firms?

5 Q. The large firms.

6 A. On the large firm side, well, I'm not sure that I agree with  
7 that. Some large firms run -- have a great deal of cash flow  
8 volatility such that they wouldn't want to tie some of that  
9 volatility up with an ASO plan or might just find the function  
10 so far outside of their regular operations that they don't feel  
11 capable of running an ASO plan. I think you'd have to ask one  
12 of those firms.

13 Q. Thank you. One factual question for you. Are you aware  
14 that any self-funded plans reimburse the Blues for cost of  
15 claims and the Blues pay those claims directly to providers?

16 A. I've heard something similar to that quote. I understand  
17 that can happen sometimes. I understand typically one can think  
18 of -- there's an arrangement that one can think of as a margin  
19 account that's held at the provider -- I'm sorry -- not the  
20 provider, the -- the company providing the ASO services such  
21 that they can pay out of that account.

22 Now, the company will need to top up that account, as they  
23 would a margin account. Sometimes expenditures might exceed  
24 that account, and the ASO company might make payment out of  
25 their own account and ask for that to be reimbursed. So there

1 are a lot of potential arrangements this way and a lot of ways  
2 that things can work out idiosyncratically, occasionally.

3 Q. But it's your opinion that payments to third parties in this  
4 case are irrelevant for the damages analysis that you've  
5 performed; correct?

6 A. Well --

7 Q. Sorry. Not damages analysis, just the analysis that you  
8 performed.

9 A. Well, yes, payments to third parties are payments to third  
10 parties.

11 Q. Uh-huh. What about payments to the Blues? Do you view  
12 those as being irrelevant?

13 A. What types of payments to the Blues?

14 Q. Any payment to the Blue.

15 A. I'm sorry. That question -- can you refocus that a little  
16 bit? That doesn't make sense to me.

17 Q. I'm going to start with a categorical question. A payment  
18 is made to a Blue by a member of the damages class. Do you view  
19 that as being irrelevant to your analysis?

20 A. Well, you'd have to define "paid to the Blue."

21 Q. You can give me whatever definition you like.

22 A. If we go back to the concept of revenue and this distinction  
23 between revenue and premium equivalent, particularly in the  
24 context of paid claims, I'm satisfied with my gross revenue  
25 analysis, and it's reasonable in accuracy because those payments



1 that come through the ASO to pay claims are not characterized as  
2 revenue. They're just not. Revenue has a meaning in economics  
3 and in accounting, and it is money that's taken in, for  
4 instance, in return for the sale of goods and set against the  
5 cost of those goods, upon which there is earned a profit. Those  
6 flow-through payments are not revenue in the same sense.

7 That being said, I don't rely exclusively or solely upon  
8 that gross revenue analysis. I merely set it up as the most raw  
9 application of the data for purposes of comparing a starting  
10 multiple and work from there. As was noted previously, that's  
11 my lowest multiple.

12 Q. Okay.

13 A. I don't seek to drive that any lower, but it's there as a  
14 data point. And I think Mr. Burns suggested if one wanted to,  
15 one would Winsorize my observations, throw out the highest and  
16 the lowest, and you'd be left with a grouping that's, in fact,  
17 lower than six and a half percent.

18 Q. I've got two more questions. I recall you giving testimony  
19 when Mr. Burns was asking you questions where he was asking you  
20 about certain items and fees that are listed in our brief that  
21 say these are items that Dr. Mason should have considered. At  
22 that time, we were talking about what we call the Burns report.  
23 Do you recall that testimony?

24 A. I remember him listing some items. I'm not sure that ended  
25 up being a question for me, but I recall such listing and I

1 recall that from objectors' reports in this matter.

2 Q. And I seem to recall you saying that those -- and I might be  
3 misremembering. Either you saying or him saying that those fees  
4 weren't at issue in the current complaint. Do you recall that  
5 line of questioning?

6 A. You'd have to -- perhaps you could reread that from the  
7 record. I'm sorry. This is a function of that being this  
8 morning and this being this afternoon.

9 Q. I understand. We're human.

10 A. And I want to -- this sounds like something I want to make  
11 sure is accurate before we go down this rabbit hole.

12 Q. Certainly. I can give you -- I can give you a copy of that  
13 brief if you hold on just a second.

14 (Brief pause)

15 A. Also, just to help save time -- my point is not to hold  
16 things up, and I think I can answer this in a more general  
17 sense.

18 To the extent that any of those are relevant revenue from  
19 the perspective of the horizontal allocation scheme that we have  
20 before us, those are included in the QFR data which I've used.  
21 To the extent that they're not included in the QFR data, they're  
22 not directly affected by the horizontal allocation scheme, and  
23 they don't seem to me to be relevant to this matter.

24 Q. Okay. What I wanted to harken you back to -- and I  
25 appreciate that clarification. You said that if -- you did not

1 understand that those fees were the subject of the allegations  
2 in the complaint. And I've put the list there in front of you.  
3 Do you recall that testimony, saying that you were triggering  
4 what you analyzed based on what was alleged in the complaint?

5 A. That seemed to be two questions. In answer to the second  
6 question, I would say yes. Throughout my analysis, I sought to  
7 link my analysis to monies that were found at issue in this  
8 matter, in particular, monies affected by the horizontal  
9 restraints here, realizing there's some boundary across which  
10 it's difficult or potentially impossible to show an effect of  
11 the horizontal restraints.

12 I believe Mr. Boies mentioned earlier that at a certain  
13 point, you might get two different theories of antitrust to  
14 involve these other moneys that were not directly affected by  
15 the horizontal territorial restraints. And my understanding is  
16 that plaintiffs and objectors have never alleged that any other  
17 monies are involved here, and no other analysis has been done on  
18 other theories of antitrust that would implicate such monies.

19 Q. But you would agree that if the fees are alleged in the  
20 complaint to be a part of the horizontal price-fixing or the  
21 antitrust behavior described -- anticompetitive behavior  
22 described in the complaint, that they are something that should  
23 be analyzed?

24 A. Let's see. Are we referring now to the extra fees that  
25 objectors allege should be included --

1 Q. What I'm trying to do is --

2 A. -- penning that little bit of language in the complaint?

3 Well, those extra frees are already included in the fully  
4 insureds, so they're on both sides.

5 Q. This is my first time to talk to you. I'm just trying to  
6 get the outlines of your opinion about what's relevant to be in  
7 and what should be out of the analysis. So that was the basis  
8 of my question.

9 As you understand it, if it's in the complaint, it's fair  
10 game for your analysis. If it's out of the complaint, it's  
11 outside your analysis. Is that a fair summary?

12 A. No.

13 Q. Okay. Please, can you say what that summary is with that?  
14 It's my last question.

15 A. As I said before, my footnote 54 reflects the data that I've  
16 used for my analysis. It's my understanding that BCBS  
17 representatives have represented to me and my team that this is  
18 the data that is directly affected by the alleged horizontal  
19 restraints in this matter and, therefore, this is the data  
20 regarding the money at issue in this case that would be the  
21 source of a potential overcharge arising from such horizontal  
22 territorial restraints.

23 Q. Okay. So footnote 54 is where I should go, not the  
24 allegations of the complaint?

25 A. Well, the data that's described in footnote 54 was matched

1 against the complaint. If you have questions about what's  
2 included in that data and whether it includes elements of the  
3 complaint, I'm happy to answer those questions as I can.

4 As I've said, the allegation by objectors that my  
5 self-funded revenue is limited only to ASO fees is patently  
6 false. But beyond that, what is included and excluded can be  
7 indicated to you by BCBS representatives. I would suggest you  
8 talk to attorneys in this matter and ask for this data and  
9 analyze this data to better answer your own questions about  
10 what's in this data that I think objectors have been aware of  
11 since July.

12 MR. RICHIE: Your Honor, can I move to strike that last  
13 answer as --

14 THE COURT: No.

15 MR. RICHIE: Okay.

16 THE COURT: We're not in front of a jury. I can weed  
17 through things.

18 MR. RICHIE: Yes, Your Honor.

19 THE COURT: And for every time you mention something  
20 like that, it's just something else we can't get to.

21 MR. RICHIE: It is legitimate for me to want to know  
22 the sources on which he's relying. I asked him what's in the --  
23 what he got, what he included.

24 THE COURT: All right. So what were the sources you  
25 relied upon in reaching this particular conclusion in your

1 report?

2 THE WITNESS: There was the sources described in  
3 footnote 54, the quarterly financial reports, and the quarterly  
4 enrollment reports issued by BCBS that contain all the revenues  
5 that are associated with national best efforts and local best  
6 efforts and used to measure those. So they're all the revenues  
7 that relate to the horizontal territorial restraints in this  
8 matter.

9 THE COURT: Any questions about that answer?

10 Q. My question was specifically how those relate to the  
11 categories in the complaint that you testified about earlier.  
12 Did you compare that list against the categories of fees that  
13 were alleged in the complaint?

14 A. I'll repeat my same answer or not, if the Court wishes me --

15 THE COURT: Let me ask this before we --

16 THE WITNESS: Thank you.

17 THE COURT: I'm laying a foundation for that question.  
18 Did you use the complaint as one of your primary sources of  
19 information to piece through your economic analysis, or did you  
20 use something else in addition to the complaint, or did you not  
21 use the complaint at all?

22 THE WITNESS: Thank you. Sorry to retread ground.  
23 I'll try to do so quickly.

24 Let's go back to our discussion about the if you know  
25 one Blue, you know one Blue. This data is different for every

1 Blue. It -- and in fact, I think objectors even say there are  
2 different terms for these things in their lists, and they're  
3 difficult to track through Blue by Blue. What I needed was a  
4 consistent set of reported data that related to the horizontal  
5 territorial restraints, our part of the complaint. So in that  
6 sense, I sought to equate the data that I used to the claims in  
7 the complaint.

8 Your question seems to be did I go through and look for  
9 these different classifications, which objectors admit are not  
10 called the same things in every Blue --

11 MR. RICHIE: Okay.

12 THE WITNESS: -- or even every plan that's issued by  
13 every Blue. And the answer is obviously not, because they don't  
14 even go by the same name. And reconciling those would be  
15 difficult, if not impossible, as objectors point out. So I  
16 didn't undertake that exercise.

17 Q. So you don't --

18 THE WITNESS: I relied upon the Blues themselves to  
19 represent to me what revenue is touched by these horizontal  
20 territorial restraints, which is the main piece of the complaint  
21 with which we're concerned here. To some extent, it's my  
22 understanding this revenue does cover some of these categories  
23 expressed in general terms. But did I try to forensically put  
24 those back together and say exactly what's in that bucket? No,  
25 I did not. As you note -- as objectors note, that would be a

1 Herculean exercise and also of little value to my exercise here,  
2 which is to allocate or look for indicia by which to judge that  
3 an allocation that's been negotiated may or may not be  
4 reasonable in this matter.

5 Q. (Mr. Richie, continuing:) Who specifically at the Blues did  
6 you communicate with?

7 A. That, I do not recall.

8 Q. Generally, who did you communicate with at the Blues?  
9 Describe the person as best you can.

10 A. I think the attorneys here would be better situated to  
11 answer that question. They set up all such communications and  
12 were party to all such communications.

13 Q. How did you receive that communication from the Blues?

14 A. I know there were a number of telephone calls --

15 Q. When did those calls --

16 A. -- with representatives that understood this data and were  
17 there to answer our questions.

18 Q. When did those calls occur?

19 A. They would have occurred in late 2019, maybe going into  
20 early 2020, but they might have -- we started work on this in  
21 about September 2019. I think we strived to answer our  
22 questions and get a reliable data source as quickly as possible.

23 THE COURT: Mr. Richie, I gave you five more minutes 17  
24 minutes ago.

25 MR. RICHIE: I know, Your Honor.



1 THE COURT: All right. You may sit down.

2 MR. RICHIE: Thank you.

3 THE COURT: All right. Anything further with this  
4 person?

5 MR. BURNS: Nothing further, Your Honor.

6 THE COURT: All right. Dr. Mason, you may step down.

7 All right. So I am going to give the same courtesy to  
8 the objectors that I gave to Mr. Burns, and that is in  
9 presenting your expert, I'm going to give you up to 15 minutes  
10 to lay the foundation or give me some context of what he's going  
11 to testify about. And then we'll turn it over to  
12 cross-examination. Fair enough?

13 MR. MULLINS: Yes, sir. Yes, Your Honor.

14 THE COURT: Okay. And I know we know who it is, but  
15 formally announce your next witness.

16 MR. BURNS: Your Honor, just briefly, can Mr. Mason  
17 be -- or Dr. Mason be excused?

18 THE COURT: Yes.

19 MR. BURNS: Thank you.

20 MR. MULLINS: Your Honor, the self-funded objectors  
21 would call Ugo Okpewho as our witness.

22 THE COURT: Thank you.

23 Welcome, sir.

24 THE WITNESS: Thank you.

25 MR. CRAMER: I just want to hand out and make sure

1 everyone has a copy of his report.

2 (Off-the-record discussion)

3 THE COURT: Do you have a copy for me?

4 MR. CRAMER: I do.

5 THE COURT: Thank you. I think I have one, but that  
6 will keep me from digging. Thank you.

7 THE CLERK: Raise your right hand, please.

8 (The witness is administered the oath)

9 THE CLERK: Be seated, please.

10 State your name for the record, please.

11 THE WITNESS: Ugo Okpewho.

12 THE CLERK: And spell your first and last names for the  
13 record.

14 THE WITNESS: First name, U-G-O. Last name  
15 O-K-P-E-W-H-O.

16 THE COURT: All right. You may proceed when you're  
17 ready.

18 MR. CRAMER: Thank you, Your Honor.

19 **UGO OKPEWHO**

20 The witness, having sworn or affirmed to speak the truth, the  
21 whole truth, and nothing but the truth, testified as follows:

22 DIRECT EXAMINATION

23 MR. MULLINS:

24 Q. And you have given us permission to call you Ugo. Thank  
25 you.

1 A. Correct.

2 Q. Mr. Ugo, you've been employed at BDO since May of 2020; is  
3 that correct?

4 A. Correct.

5 Q. And your position is director and health actuarial leader;  
6 is that right?

7 A. Health care -- health care advisory, health care actuarial  
8 leader. Yes.

9 Q. Thank you. And for purposes of today's hearing, you and  
10 Mr. Watson, also from BDO, have prepared two reports for the  
11 Court. Am I right about that?

12 A. Correct.

13 Q. Can you quickly explain for the Court what training you have  
14 had to become an actuary.

15 A. Sure. Unlike you lawyers who go to law school for three  
16 years, we -- you know, we actually take rigorous exams -- that  
17 was a joke. We take very rigorous mathematical quantitative  
18 exams for, you know, a period of eight to 12 years. We  
19 specialize in, you know, a sector. I specialized in health  
20 care.

21 I've worked for -- I've been in the health care industry for  
22 about 21, 22 years, 12 years working with various Blues plans,  
23 Blue Cross of Maryland, New Jersey. I've also done health care  
24 consulting work on this, you know, very matter for a long time  
25 as well. So...

1 Q. Thank you. And I believe you told me at one point in time  
2 that there are more lawyers in Brooklyn than there are  
3 credentialed actuaries in the entire country.

4 A. That is true. Yes.

5 Q. Can you explain briefly what you do in your job currently at  
6 BDO?

7 A. Sure. At BDO, I work for -- I work on behalf of employers  
8 of all sizes, all types of industries, you know, tackling health  
9 care risk, health care claims costs, projecting their claims,  
10 their forecasting, pricing, helping them get the best health  
11 care deals possible.

12 Health care is, you know, 17 to 20 percent of the GDP. It's  
13 rising. It's the most, you know, unsustainable sector of our  
14 country. And, you know, people come up with different ways to  
15 try to, you know, cut costs and save money. And, you know, my  
16 job is to work with fully insured groups as self-funded groups  
17 to, you know, try to get them the best health care deals and  
18 save them money as possible, using a variety of programs and  
19 measures.

20 Q. And so part of what you do includes analyzing and comparing  
21 the differences in costs that health care insurers want to  
22 charge employers for purchasing either a fully insured plan or a  
23 self-funded plan.

24 A. Exactly. You know, we do an exercise with all our clients  
25 every year. We say, okay, is this the -- you know, if they're

1 fully insured, we say is this the year you go self-funded? And  
2 we do an analysis. We say, okay. What -- you know, we look at  
3 all the carriers, you know, Blues Cross's quotes, Aetna's  
4 quotes, United's quotes; and we take them through the exercise  
5 saying, you know, under a fully insured engagement, this is how  
6 much you end up paying. And that's more -- more easily  
7 forecasted because you know it's a fixed cost and, you know, you  
8 essentially multiply it by the number of employees you have  
9 every month or every year and you know -- plus or minus, you  
10 know, some degree of uncertainty -- you know how much you're  
11 going to spend.

12 For the self-insured, we -- you know, we do a claims  
13 projection. We say, okay, you know, since you're at risk for  
14 the claims, this is how much we expect you to expend on the  
15 claims side. And then you take the ASO fee, you attach that,  
16 attach all the fees like stop-loss and all the programs that  
17 the employer chooses to, you know, provide for the employees.  
18 And we compare the cost every year. Some years, you know, it's  
19 advantageous for you to go fully insured. Some years it's  
20 better for you to go self-insured. So this is an exercise we do  
21 with all our clients.

22 Q. And so it sounds like what happens from year to year is  
23 there are some employers that switch back and forth between a  
24 fully insured plan and a self-funded plan.

25 A. Absolutely. Yes.

1 Q. And would you consider them substitutes one to another?

2 A. I would say so in that context, yes.

3 Q. So when you're analyzing the potential cost of the  
4 self-funded coverage, it doesn't sound like you analyze just the  
5 ASO or this administrative fee that the employer will incur.  
6 You also analyze the cost to the employer of what have been  
7 referred to here as value-added services and other programs  
8 along with the projected medical claims cost as well. Am I  
9 right about that?

10 A. Exactly. Yep.

11 Q. And at BDO, do you analyze Blue Cross plans?

12 A. Yes, we do.

13 Q. And these value-added or other programs, there's a whole  
14 laundry list, and I promised Judge I'd let him know what they  
15 were. Stop-loss insurance?

16 A. Yes.

17 Q. Actuarial services?

18 A. Exactly. Yes.

19 Q. Provider network access?

20 A. Yes.

21 Q. Medical management -- medical cost management services?

22 A. Yeah. That's a big one. Yeah.

23 Q. Disease management?

24 A. Uh-huh. Yes.

25 Q. Wellness programs?

1 A. Yes.

2 Q. Other administrative and PBM services?

3 A. Yes.

4 Q. Which would be pharmacy benefit management services?

5 A. Yes.

6 Q. Dental insurance?

7 A. Yes.

8 Q. Vision insurance?

9 A. Yes.

10 Q. Life and disability insurance?

11 A. Yes.

12 Q. Radiology benefit management and analytics?

13 A. Yes.

14 Q. And personal health care services?

15 A. Yes.

16 Q. And those are all of these value-added services that are  
17 included in self-funded plans if an employer chooses to use  
18 them?

19 A. Yes.

20 Q. And they have to pay for each one of those?

21 A. Exactly. Yes.

22 Q. Do these items also include -- are they also included in  
23 fully insured plans?

24 A. Yes. Exactly. They are. They're just bundled in one rate  
25 that the -- that the employer is comfortable paying.

1 Q. So these value-added services are included in both types of  
2 plans?

3 A. Both types of plans, yes.

4 Q. And so when you're doing your analysis, you have to account  
5 for both -- for all services for both plans.

6 A. Precisely. Yes.

7 Q. The value-added products that we've talked about that are  
8 paid for by the fully insured plans as a part of this bundle,  
9 are those impacted by the Blue Cross conduct in this case?

10 A. Yes.

11 Q. And would the cost of the value-added services incurred by  
12 the self-funded plans also be impacted by the Blue Cross conduct  
13 in this case?

14 A. Yes.

15 Q. Do you make any distinction when you're trying to price  
16 these plans and figure out what the costs are going to be  
17 between a fully insured plan and a self-funded plan in terms of  
18 these value-added services?

19 A. No. I mean every -- you know, Blue Cross, every member is  
20 treated the same. That's -- that's -- I think that's the basic  
21 thing that's being missed here. You know, if -- you know, this  
22 case is about an antitrust case; right? You know, Blue Cross  
23 Blue Shield, you know, values each member the same. You know,  
24 they need a multitude of members so they can position themselves  
25 better when they're negotiating contracts with, you know,



1 physicians and hospitals.

2 And, you know, one individual that happens to work for a  
3 firm, same exact plan, same risk profile, same morbidity,  
4 average morbidity, you know, same lifestyle, they -- you know,  
5 they have two separate -- they have, you know, pretty much the  
6 same plan. One works for a firm that self-funds and another  
7 works for a firm that fully insured -- fully insures. They  
8 incur the same costs when they go to the hospitals or, you know,  
9 see the physicians buying the same plan. And, you know, Blue  
10 Cross's power is essentially in their networks and how, you  
11 know, deep they can negotiate discounts with hospitals and  
12 providers.

13 And that's why you must include the claims cost on the  
14 self-insured side to build up the fully insured rate because  
15 that's being done on the same side. When you look at the fully  
16 insured rate, it's essentially the same thing.

17 You know, the only -- I'm sorry. The only real difference  
18 is, you know, who takes the risk on the claims. On the  
19 self-insured side, the -- you know, the employer says, you know  
20 what, I mean, I think I can manage my claims a little better  
21 this year. Next year it may be different; but this year, I  
22 think I may be able to, you know, manage my claims a little  
23 better.

24 So on the fully insured side, the -- Blue Cross pays -- you  
25 know, takes risk on the claim and adds a little premium on that

1 risk. So, really, you know, the claims are on the same basis  
2 but just a little bit of, you know, risk markup on the claims  
3 because they're the ones taking on the risk for the claims.

4 So...

5 Q. So when you're pricing these plans for employers and they're  
6 trying to make a decision about fully insured or self-funded, do  
7 you account for some purported lack of competition among fully  
8 insured plans versus self-insured and TPA competition that may  
9 be there against Blue Cross?

10 A. Not at all. No.

11 Q. Have you ever heard anything like that when you're trying to  
12 decide who's going to pay what?

13 A. No, I haven't. I've been in the industry two decades. I  
14 have a deep network of, you know, not just actuaries like  
15 myself, but health care professionals in, you know, marketing,  
16 sales, advertising, working for Blues, United, Aetna, different  
17 firms. And this has never come up.

18 Q. So is what I'm hearing from what you said earlier that the  
19 difference in how you price a fully insured product for a Blue  
20 Cross plan versus a self-funded plan is you build -- Blue Cross  
21 will build in a risk factor into the fully insured premium  
22 because of the potential that claims costs could get higher than  
23 what they were intended to be initially when premiums began  
24 being paid?

25 A. Yeah. Largely. Exactly. So that and -- you know, you have

1 the individual market, the small group market. There are a lot  
2 of transient members that go in and out of the individual  
3 market. There's -- you know, there's some more risk to that.  
4 Small group market, you have smaller -- you know, under 50  
5 lives. You know, you don't have as many -- as many people --  
6 you don't have enough people to dampen some of the, you know,  
7 catastrophic claims or, you know, claims that things may be  
8 adverse. So, you know, you're taking a little bit more risk and  
9 you're insuring these people that you're mandated to insure.  
10 So, you know, there's -- so, you know, there's a risk factor  
11 with just, okay, these are claims that I'm paying. But you  
12 also, you know, tack on a couple of things for risk as well.  
13 Q. So just to be clear, the rates and the differences in the  
14 prices that are being paid for fully insured versus self-funded  
15 is based primarily on risk to Blue Cross, not on some alleged  
16 competition --  
17 A. No.  
18 Q. -- or lack of competition out in the self-insured versus  
19 fully insured markets?  
20 A. Yeah. Risk, taxes and fees, you know, their building a  
21 profit, things like that. But, you know, I have it in my  
22 report. You know, on average, it's 20 to 35 percent of spread  
23 between the average fully insured plan and a fully built-up  
24 premium equivalent self-funded plan.  
25 Q. And is this premium equivalent methodology that you've used

1 in your report to determine this risk -- or the allocation, 20  
2 to 35 percent higher cost to the fully insured, is premium  
3 equivalent the industry standard to do that?

4 A. Absolutely. Yeah. I mean, because it's -- you know, no  
5 employer comes to you and says, oh, you know, I'd like to see  
6 what the ASO fee is. You know, that's -- that's just a small  
7 portion of things. You know, people are concerned about what's  
8 my health care cost going to be, how much am I going to pay, how  
9 much am I going to, you know, charge to my employees in terms of  
10 contributions. You know, it can be a very, very complicated  
11 analysis, especially for a large plant who have, you know,  
12 unions and different types of groups that they want to protect.  
13 But, you know, the basic premise of it is what's my health care  
14 cost going to be.

15 You know, and in the self-funded arrangement, the employer  
16 takes the -- you know, takes on the risk for it. But it's --  
17 you know, it's part of -- you know, it's the same network. It's  
18 the same network for the fully insured plans and the self-funded  
19 plans. People are seeing the same doctors, the same -- you  
20 know, the same, on average, procedures are being done. So, you  
21 know, looking at just an ASO fee and comparing it to a fully  
22 insured premium is a completely flawed way to look at things.

23 Q. In your 12 years of working at Blue Cross, did anyone ever  
24 suggest to you that these rate differentials between fully  
25 insured and self-insured were based on anything other than the

1 risk factors that you've testified about plus the taxes and  
2 fees?

3 A. No, not at all. It's a --

4 Q. Never heard that from anybody?

5 A. Yeah. Yeah. I mean, you have to be in the health care  
6 industry to -- it's a very, very, you know, nuanced, complicated  
7 industry.

8 And, you know, I respect Dr. Mason. And, you know, I'm sure  
9 he's -- I mean, he's obviously a very bright man. But, you  
10 know, you need to possess a deep health insurance, health care  
11 knowledge to understand these things. Even his reports -- you  
12 know, I mean it's clear that, you know, he probably just took  
13 the report and, you know, talked to a couple of people and, you  
14 know, used it. You know, even within Blue Cross sometimes we  
15 got data and we had to scrub it and, you know, look at it  
16 different ways and understand where it came from and talk to all  
17 the parties involved. And, you know, you really have to  
18 understand the data that you're using.

19 Q. Did he use some economic theories that don't apply to the  
20 health care industry in this case versus real-world analysis  
21 that you did?

22 A. I think that, you know -- I mean, I think that his analysis  
23 was -- you know, would work on a different setting. You know, I  
24 mean, I just think that his basic -- you know, the basic premise  
25 of his work was flawed to begin with. You know, he used -- you

1 know, his whole argument is using an ASO rate. And he's looking  
2 at profitability and, you know, price increase differences and  
3 everything and comparing that to a fully insured rate. And  
4 that's -- like that's not apples to apples when you're talking  
5 about health care costs, especially when you're dealing with an  
6 antitrust case where Blue Cross is affecting the market by, you  
7 know -- you know, dominating the market by, you know, provider  
8 contracts --

9 (Technical interference)

10 THE WITNESS: I'm sorry. Did you guys hear that?

11 THE COURT: Yes. I think we all heard that. We're not  
12 sure what it was.

13 I think you're about at your time.

14 THE WITNESS: Okay. Yes. Sorry.

15 Q. So we heard from Dr. Mason that his theory is that Blue  
16 Cross is able to get self-funded business because there's a lack  
17 of competition in the TPA industry. In your professional  
18 experience of 20-plus years, what is it that drives self-funded  
19 business to Blue Cross? Is it this lack of competition in the  
20 TPA marketplace, or is it something else?

21 A. It's the networks, Blue Cross's networks. They -- you know,  
22 it allows, you know, people to -- it allows them to negotiate,  
23 you know, deep discounts and, you know, get favorable pricing in  
24 the marketplace. It's the networks that attract everyone.

25 THE COURT: I think you became the Blues expert just

1 then.

2 THE WITNESS: You think I did? I mean, I was with them  
3 for 12 years, so...

4 THE COURT: All right. Thank you.

5 Cross-examination?

6 MR. BOIES: Thank you, Your Honor.

7 THE COURT: How much time do you think you need,  
8 Mr. Boies?

9 MR. BOIES: I'll try not to take longer than they did.  
10 I don't know whether I'll succeed.

11 CROSS-EXAMINATION

12 BY MR. BOIES:

13 Q. Good afternoon.

14 A. Good afternoon.

15 Q. We haven't met, but my name is David Boies.

16 A. Hello, David. Nice to meet you.

17 Q. And you understand that I represent the plaintiffs here?

18 A. I do.

19 Q. Now, you said that the prices that Blue charge -- Blue Cross  
20 charged for all of the services were impacted by the Blue Cross  
21 conduct in this case. Do you recall that?

22 A. I recall saying that, you know, if -- if this matter, which  
23 I believe it is, refers to the antitrust practices of Blue  
24 Cross, then, you know, all claims -- all health care claims,  
25 which represent 80 to 85 percent of total premiums, are

1 affected. And that impacts self-funded and fully insured  
2 employers and employees the same way.

3 Q. Are you saying that Blue Cross charges to both ASOs and  
4 fully insured customers include an overcharge because of the  
5 anticompetitive conduct that's involved in this case?

6 A. I'm not saying that. No.

7 Q. You're not saying that.

8 A. No.

9 Q. Does it?

10 A. Can you speak into the mike? I'm sorry.

11 Q. Sure. When Blue Cross charges fully insured companies  
12 premiums, in your opinion, does that include an overcharge as a  
13 result of the competitive constraints alleged in this case?

14 A. I'm not claiming that. No. Blue Cross charges fully  
15 insured customers a fully insured rate. They turn around and  
16 they charge self-funded employees an ASO rate. But that ASO  
17 rate is only a fraction of the health care costs for them.

18 Q. Let me ask you to listen to my question. Blue Cross charges  
19 fully insured customers a premium; correct?

20 A. Yes.

21 Q. Does that premium include an overcharge as a result of the  
22 conduct that is alleged in this case?

23 A. I'm not stating that. No. I mean, that was --

24 Q. I'm asking you, sir. Does it?

25 A. I don't know that. I mean, I don't know. I mean, that's



1 not the scope of my -- of my analysis and my involvement.

2 Q. When you were working for Blue Cross of Maryland, did Blue  
3 Cross of Maryland overcharge customers?

4 A. I can't state that. I don't know.

5 Q. Well, when you were working for Blue Cross of New Jersey,  
6 did Blue Cross of New Jersey add in a charge as a result of  
7 their competitive market power resulting from the competitive  
8 constraints that are involved in this case?

9 A. I can't state that. I don't know.

10 Q. Did you ever make any effort to determine how much  
11 overcharge, if any, Blue Cross's fully insured customers paid?

12 A. No. I don't know -- no.

13 Q. Did you ever make any effort to determine how much  
14 overcharge, if any, Blue Cross's self-funded customers paid?

15 A. No, I did not.

16 Q. Have you ever been involved in a case to try to allocate  
17 damages among class members?

18 A. An antitrust case, no. But my partner, who's a partner at  
19 BDO's Center For Health Care Excellence, he and I wrote this  
20 report. He's been in multiple of those. I have never.

21 Q. He's been in all sorts of what?

22 A. He's been involved in antitrust cases before, but I have  
23 not.

24 Q. This partner of yours who is not here, has he ever been  
25 involved in allocating damages among class members?

1 A. You'll have to ask him. No, I don't know.

2 Q. Okay. You said that Blue Cross values each member the same,  
3 whether it's fully insured or self-funded. Did I hear you  
4 right?

5 A. I believe so, yes. That's my belief. Yeah.

6 Q. That's your belief?

7 A. That's my belief working there for a dozen years, yeah.

8 Q. When you were working at Blue Cross, did you ever see any  
9 reports that said that a fully insured member is worth ten times  
10 a self-funded member?

11 A. I did not. No.

12 Q. At any time, have you ever seen any evidence of that?

13 A. I don't believe I have.

14 Q. Did -- did the counsel that employed you show you any  
15 documents that said that a fully insured member is worth ten  
16 times a self-funded member?

17 A. I do recall seeing something like that. I don't -- you  
18 know, it wasn't -- it wasn't part of my argument. It wasn't  
19 parts of my point. But I do recall seeing something like that.  
20 Yeah.

21 Q. So you did -- you did see a document that said Blue Cross  
22 valued a fully insured member ten times a self-funded member;  
23 correct, sir?

24 A. I -- I think I did. Yeah.

25 Q. And that would indicate, would it not, sir, that Blue Cross

1 does not value each member the same?

2 A. You know -- you know, who wrote that report? I'm not sure,  
3 you know, the validity. I don't know what data they used. I  
4 don't know the accuracy of it. I -- you know.

5 Q. Well, it was a Blue Cross document, though; right, sir?

6 A. I don't remember it being a Blue Cross document.

7 Q. Did you make any effort to investigate how reliable it was?

8 A. I did not. No. I was focused on -- on, you know, the  
9 points that I was making and, you know, I looked at it from  
10 different perspectives. And, you know, many -- you know, many  
11 other routes were incorrect, but this -- the route I took, I --  
12 I thought was, you know, the most accurate.

13 Q. One of the points you made was that Blue Cross believes  
14 every covered life is equally valuable. That's one of the  
15 points you made in your testimony; right?

16 A. Yes. And I do believe that. Yeah.

17 Q. And you do understand that this document that you saw is  
18 inconsistent with that; correct?

19 A. Sure. Could be.

20 Q. Well, it is inconsistent; right? It says ten times. That's  
21 obviously not the same.

22 A. Right. But I believe that Blue -- you know, having worked  
23 there over a decade, I believe that Blue Cross values every  
24 member equally. You know, it is -- it is the empire. I mean,  
25 they need the members in the empire to be able to help them in

1 negotiations with hospitals and, you know, providers and  
2 physicians. And that's -- and that's what they value the most.

3 Q. When you talk about the Blue Cross empire, talking about the  
4 Blue Cross system?

5 A. Yeah. System -- the system, number of -- number of lives,  
6 number of accounts they have, fully insured lives, self-insured  
7 lives, Medicaids, Medicare. I know that's beyond the scope of  
8 this, but government, everything.

9 Q. Accepting that Blue Cross wants to have a lot of covered  
10 lives of all kinds, do you accept that some of those covered  
11 lives are more profitable to Blue Cross than others?

12 A. It's hard to -- to gauge that. I mean, it's -- it's very  
13 hard to, you know, calculate profitability. It's hard. I mean  
14 even -- even I think Dr. Mason said that. You know, I'm not  
15 quoting him, but this is a very difficult exercise.

16 And trying to get a data to come up with this allocation, I  
17 mean, as he did, you know -- I mean, he did it in a -- in an  
18 incorrect -- you know, he got a report and he did it in an  
19 incorrect fashion. You know, he took fully insured premiums and  
20 he took ASO premiums, which are only a fraction of health care  
21 costs, so, you know, I mean --

22 Q. Sir, do you remember what question you're answering?

23 A. I'm trying to answer your question. Yes.

24 Q. Let me ask you have you seen documents that say that the  
25 fully insured business for Blue Cross provides nearly six times

1 as much operating gain per member per month as an ASO?

2 A. I saw that document. Yes, I did.

3 Q. And that was another Blue Cross document; right, sir?

4 A. I believe it was. Yeah.

5 Q. And in fact, that was an Anthem document, wasn't it?

6 A. I don't exactly remember. Yeah, but I -- I did see that  
7 document.

8 Q. And you don't have any reason to doubt the accuracy of that  
9 document, do you, sir?

10 A. Listen, I'm an actuary. I don't take anything that I see at  
11 face value. I -- you know, I would want to investigate it  
12 thoroughly and make sure that, you know, it's being used in the  
13 right context and, you know, it's, you know, reporting the right  
14 thing.

15 Q. Did you make any effort to investigate it, sir?

16 A. I did not.

17 Q. Now, in your report, you quote a publication, I think Modern  
18 Health. Remember that?

19 A. Yes.

20 Q. And you quote it to the effect that for the larger national  
21 insurers on the self-funded plans, margins can reach five  
22 percent; correct?

23 A. Correct. Correct.

24 Q. And did you believe that the *Modern Healthcare* magazine that  
25 you were quoting was a reliable source?

1 A. I thought it was a good enough proxy because that -- you  
2 know, because it's in line with, you know, what I've seen in my  
3 experience. Yes.

4 Q. Now, what you quote here -- you say, according to *Modern*  
5 *Healthcare*, margins for the national -- for the larger national  
6 insurers on their SF plans can reach five percent.

7 That's on page 10, the last paragraph of your report;  
8 correct, sir?

9 A. Correct.

10 Q. Now, with the Court's permission, I'm going to hand you a  
11 copy of Plaintiffs' Exhibit 1, which is that *Modern Healthcare*  
12 report.

13 MR. BOIES: I think the Court already has one.

14 Do you have a copy of this, Your Honor?

15 THE COURT: I could use a copy, just for ease of  
16 reference.

17 MR. BOIES: Great.

18 THE COURT: Thank you. Yes, I do have this now that I  
19 see it.

20 Q. Now, *Modern Healthcare*, in this article, in addition to  
21 saying what can happen in certain instances, also talks about  
22 what happens on average, correct, sir?

23 A. Correct.

24 Q. And what it says is that on average, commercial ASO  
25 contracts are break-even; correct, sir?

1 A. What page is that on?

2 THE COURT: Page 3.

3 Q. Page 3.

4 THE COURT: First full paragraph.

5 MR. BOIES: Yes.

6 A. Okay. Yep.

7 Q. That's what it says; correct, sir?

8 A. Correct.

9 Q. In fact, it says the Congressional Research Service reported  
10 that commercial ASO contracts are break-even deals on average.

11 Correct, sir?

12 A. Correct.

13 Q. So that means that if there are some that are 5 percent  
14 positive, there are some that are 5 percent negative; correct,  
15 sir?

16 A. Okay.

17 Q. Right?

18 A. Generally, yes. That's what break-even means.

19 Q. Right. Now, you know that Blue Cross's fully insured  
20 contracts are not break-even; correct, sir?

21 A. That's -- that's not a definitive -- that's not a definitive  
22 statement. That's not a definitive statement.

23 Q. Well, you know that Blue Cross makes money; right, sir?

24 A. I mean, they build in a profit, yes. I mean, they build in  
25 a profit to their rates. Yes.

1 Q. And, in fact, you know from working with Blue Cross or maybe  
2 just from reading the newspapers that Blue Cross makes a lot of  
3 money every year; right?

4 A. Well, I mean -- I mean Blue Cross is heavily -- on the fully  
5 insured plans, they've heavily regulated; right? You know,  
6 there's a medical loss ratio limit for -- you know, for  
7 individuals and small groups, 80 percent; for large groups, 85  
8 percent. If the loss ratio is below that, they have to refund  
9 members, you know, their money. There's a -- there's a ceiling  
10 to your gain, but there's no floor to your losses. So, you  
11 know, some years they make exactly what they bake into profit.  
12 And on the bad years, they don't necessarily -- you know, there  
13 is a risk adjustment and other things that go into recycling of  
14 funds between insureds with the worst risk, but that's another  
15 discussion.

16 But your statement, you know, that they make money every  
17 year is not always accurate.

18 Q. When was the last time Blue Cross didn't make money, sir?

19 A. I don't know.

20 Q. Approximately.

21 A. I don't know all Blue Cross plans. I worked for two, so I  
22 can't speak for all Blues plans.

23 Q. Well, did Blue Cross make money last year?

24 A. I don't know.

25 Q. Did you investigate that?



1 A. I did not. No.

2 Q. Did you think that was at all relevant to your testimony --

3 A. No.

4 Q. -- how much money they made?

5 A. No, not at all.

6 Q. You do know that Blue Cross fully insured plans pricing is  
7 not break-even. You know that at least; right, sir?

8 A. Yes.

9 MR. BOIES: Okay. No more questions at this time, Your  
10 Honor.

11 THE COURT: All right. I take it there's no follow-up  
12 to that?

13 MR. MULLINS: Just a few brief questions.

14 THE COURT: You may.

15 REDIRECT EXAMINATION

16 BY MR. MULLINS:

17 Q. Ugo, Mr. Boies asked you some questions dealing with  
18 profitability and did Blue Cross make or not make money. And  
19 you said that was not relevant to your analysis. Can you tell  
20 the Court why not?

21 A. Because my analysis was -- I was -- I was asked to -- to,  
22 you know, determine funds based on allocation. You know, what  
23 should a self-funded plan -- an average self-funded plan get  
24 versus a fully insured plan get based -- based on the damages,  
25 an allocation.

1 Q. So was your allocation methodology, then, based on this  
2 premium -- premium equivalent analysis and the costs -- the  
3 out-of-pocket costs to fully insured versus self-insured?

4 A. Exactly. Yes.

5 Q. So you were looking at what are they actually out of pocket;  
6 right?

7 A. Yes.

8 Q. And in your professional opinion after 20-plus years, that  
9 was the best methodology to use in determining how this  
10 settlement fund ought to be allocated?

11 A. Exactly.

12 Q. The cost -- actual cost -- actual out-of-pocket to these  
13 plans.

14 A. Yes.

15 MR. MULLINS: Your Honor, that's all I have.

16 THE COURT: All right. Thank you.

17 MR. BOIES: Just one more question, Your Honor.

18 THE COURT: You may.

19 RECROSS-EXAMINATION

20 BY MR. BOIES:

21 Q. Sir, do you believe that the allocation of damages should be  
22 based on the relative amounts of overcharges that the two groups  
23 of customers paid?

24 A. No.

25 MR. BOIES: That's it, Your Honor.

1 THE COURT: All right. You may step down, sir.

2 THE WITNESS: Thank you.

3 MR. MULLINS: Your Honor, may he be excused from  
4 further participation?

5 THE COURT: He may.

6 And thank you for your attendance today.

7 THE WITNESS: Thank you, sir. Appreciate it.

8 THE COURT: I'm going to thank you even though I think  
9 you're getting paid for it.

10 THE WITNESS: Sir?

11 THE COURT: I'm going to thank you even though I think  
12 you may be getting paid for it.

13 Okay. So here's where I think -- and I think we're  
14 about to take a short break, Risa. Just bear with me one second  
15 here.

16 We have several class members who want to be heard. I  
17 know the subscriber -- do the subscriber plaintiffs still want  
18 to respond any further to this issue, or do you think your  
19 posthearing briefing can handle that? And same with the ASO  
20 counsel and the Blues.

21 MR. BOIES: I think our posthearing briefing can handle  
22 it, Your Honor.

23 THE COURT: All right.

24 MR. BURNS: Same for the self-funded class.

25 MR. LAYTIN: Same.

1 THE COURT: All right.

2 MR. MULLINS: We agree.

3 THE COURT: All right. Great.

4 I'm going to make a suggestion to make sure everybody  
5 is comfortable with getting on their planes tonight because I've  
6 had a number of requests about that. The DOL has some concerns,  
7 but they're not here. I know they're available by Zoom. What  
8 if we just reassembled next week at an appointed time on Zoom  
9 and hashed out the DOL issues?

10 MR. BOIES: That works for us, Your Honor.

11 MR. LAYTIN: Fine, Your Honor. Fine for defendants.

12 MR. MULLINS: Sure. That works.

13 THE COURT: Okay. That makes sense to me. And that  
14 way we can give them the time and attention those issues may  
15 require.

16 So when we come back, we will hear from the class  
17 members that requested to be heard. I understand that  
18 Mr. Cochran is going to provide us a transcript of what his  
19 remarks would be, and we'll hear from Mr. -- and I may be  
20 butchering some of these names. I apologize. Mr. Bluhm.

21 Is he here? B-L-U-H-M.

22 (No response)

23 THE COURT: Okay. He's not here. We won't hear from  
24 him.

25 Mr. Tykulsker?

1 (No response)

2 THE COURT: Okay. Mr. Hart?

3 SPECIAL MASTER GENTLE: Your Honor, Mr. Hart dropped  
4 off some comments in lieu of speaking.

5 THE COURT: All right. That's good.

6 Prairie Island?

7 MR. NICHOLS: James Nichols on Zoom for Prairie Island,  
8 Your Honor.

9 THE COURT: All right. And y'all be available to give  
10 us your comments after the break?

11 MR. NICHOLS: Yes, I will.

12 THE COURT: Thank you.

13 And then Mr. Behenna. You're still here. I see you  
14 back there. Thank you.

15 Well, we'll hear from Prairie Island and Mr. Behenna  
16 when we resume in about ten minutes.

17 SPECIAL MASTER GENTLE: And, Your Honor, there's also  
18 someone on Zoom for Tenneco.

19 THE COURT: Oh, yes. I thought -- we'll hear from  
20 them, then. I responded to that email. Maybe Sally hasn't  
21 gotten you that word yet.

22 SPECIAL MASTER GENTLE: All right, sir. Thank you.

23 THE COURT: But we'll hear from Tenneco also.

24 SPECIAL MASTER GENTLE: Yes, sir.

25 THE COURT: All right. Besides that, what remains to

1 be done today other than maybe just a short wrap-up?

2 MR. HAUSFELD: We don't believe anything from the  
3 subscribers, Your Honor.

4 THE COURT: Anything on this arbitration issue?

5 MR. SMITH: Your Honor, Cy Smith for the subscribers.

6 (The court reporter interrupts for clarification)

7 MR. SMITH: Cy Smith for the subscribers. On both  
8 arbitration and on the Taft-Hartley church things --

9 THE COURT: Yes.

10 MR. SMITH: -- I think that we don't need to present  
11 any argument today. We might have a couple of pages that we  
12 would submit posthearing. I don't think --

13 THE COURT: Does anybody -- so arbitration is  
14 different. I'm going to hit Taft-Hartley, but let's just do  
15 that. Anyone want to be heard on Taft-Hartley today?

16 MR. SLATER: Your Honor, that would be our argument.  
17 We'll stand on the briefs on it.

18 THE COURT: All right. So y'all can -- I'll give you a  
19 chance to respond to anything they say. How does that sound?

20 MR. SLATER: Fine.

21 THE COURT: Okay. And that goes to the church plans as  
22 well?

23 MR. SLATER: Yes, it does, Your Honor.

24 THE COURT: All right. Church plans have particularly  
25 good retirement benefits. Think about that for a second.

1 All right. Very well. Well, we'll be in a ten-minute  
2 recess and come right back, and we'll hear from Tenneco, Prairie  
3 Island, and Mr. Behenna. Thank y'all.

4 (Recess at 4:26 p.m. until 4:40 p.m.)

5 THE COURT: Okay. Let's come to order.

6 All right. I think next up is Prairie -- let's start  
7 with Prairie Island. How does that sound?

8 MR. NICHOLS: Your Honor, this is James Nichols for  
9 Prairie Island, and that sounds good to me. I'll get my video  
10 going here.

11 THE COURT: You're going to have to give us one second  
12 where we can hear you a little better.

13 MR. NICHOLS: Okay.

14 THE COURT: Do you have any more volume on your end?

15 MR. NICHOLS: I think I've got this turned up as much  
16 as I can. Is it coming through any better here?

17 THE COURT: Okay. We're just going to have to be very  
18 quiet in the courtroom so I can hear you.

19 MR. NICHOLS: Okay. Well, and, Your Honor, if I --  
20 I'll speak as loud as I can. And if something isn't clear,  
21 please let me know and I will try to cover that.

22 My name is James Nichols. I'm an attorney with the  
23 Jacobson Law Firm in St. Paul, Minnesota, and I'm here on behalf  
24 of the Prairie Island Indian Community. Prairie Island is a  
25 relatively small tribe that operates a casino in southern

1 Minnesota; but that being said, Prairie Island does have three  
2 self-insured health plans. One of those health plans is  
3 operated for members of the tribe. So this is something that  
4 the tribal government funds for the members as a supplement to  
5 other health care benefits that are available to the members.  
6 This is, you know, unique in some respects, but it's very much  
7 like the other self-insured plans that are part of the class in  
8 many other respects. The Prairie Island government goes out and  
9 purchases the Blue Cross administrative services on the open  
10 market just like any other private employer.

11 In addition to that plan, Prairie Island operates two  
12 self-insured plans for employees of its casino. Just like it  
13 does with the member -- the tribal member plan, these are  
14 self-insured plans that are just like those of any other private  
15 employer provided for the employees of the casino. The tribe  
16 goes out and buys administrative services for those plans just  
17 like anybody else, any other employer, on the open market.

18 Now, in this respect also, Prairie Island is not unique  
19 as compared to other tribes. There are 574 tribes in the United  
20 States. Many of them are much larger than Prairie Island. And  
21 it's really -- there's no telling how many of those operate  
22 self-insured plans that may have been subject to the antitrust  
23 violations that are at issue here, you know, by virtue of their  
24 purchasing administrative services from Blue Cross.

25 Now, that being said, it is unclear, at best, from the



1 current definition of the settlement class whether any of the  
2 Prairie Island self-insured plans can participate in the  
3 settlement. Quite frankly, the definition of "government  
4 account" is -- well, it's incomprehensible when you look at it  
5 from the perspective of an Indian tribe.

6           So first of all, we have this issue where Native  
7 American tribes are singled out as not part of the class.  
8 Those -- you know, "government account" includes Native American  
9 tribe. I'm not sure what that is supposed -- what that's  
10 intended to carve out or why. That just doesn't make a whole  
11 lot of sense.

12           But in addition to that, even if we take that at face  
13 value and say, okay, maybe this does exclude the self-insured  
14 plan that a tribe operates for its tribal members, well, what  
15 about the commercial operations that the tribes have? And why  
16 are -- why would a commercial operation that a tribe has and  
17 where it gets self-insurance benefits for its employees be  
18 treated any differently from any other private employer? It's  
19 impossible to tell from the class definition how that analysis  
20 would play out.

21           I've tried to get straight answers from the -- from  
22 class counsel and the settlement administrator with absolutely  
23 no luck. I have been told everything from, you know, there was  
24 an intentional decision to exclude tribes, you know, for no  
25 reason, though. Apparently, you know, there is -- there's

1 nothing in the way that Blue Cross marketed or priced the plans  
2 or administrative services to tribes that is any different than  
3 what it did for any other commercial employer that is part of  
4 the class.

5           The bottom line is that there is no reason to exclude  
6 tribes or tribal plans from the settlement class. Doing so is  
7 unfair. And, you know, with the current class definition, even  
8 assuming that the Court does approve it, this just creates a lot  
9 of confusion for tribes about whether or not, you know, they  
10 should submit claims and try to get those adjudicated by the  
11 administrator or if they're only left to pursue their claims  
12 individually. And I mean, quite frankly, it is vague enough  
13 that we are very concerned that under the current class  
14 definition, if it is determined that tribes are, you know,  
15 unfairly excluded, that they would also, you know, face  
16 arguments from Blue Cross that, you know, they can't bring their  
17 own individual claims because of how Blue Cross interprets the  
18 class definition.

19           So, you know, at -- you know, the best case we're  
20 looking at here is that the class definition is so vague as to  
21 be unworkable for tribes. But beyond that, it's unfair in any  
22 respect. I mean, there's just no good reason to treat tribes in  
23 such a different way, such a detrimental way, in comparison to  
24 other similarly situated employers and providers of self-insured  
25 health benefits.

1           Just to sort of clarify the confusion here -- you know,  
2 this is probably my last main point here is that, you know, when  
3 we look at self-insured plans that are, you know, affiliated  
4 with tribes, we've really got I guess three levels of them. The  
5 first is do self-insured plans apply for tribal members? How  
6 are those treated? Self-insured plans for tribal enterprises,  
7 how are those treated under the settlement? And then finally,  
8 self-insured plans where a tribe owns another business -- you  
9 know, something that may be incorporated under state law -- and  
10 has a self-insured plan for employees of that business. Does  
11 the fact that the tribe has incorporated the business under  
12 state law instead of operating it as an arm of the tribe make a  
13 difference? I mean, it's unclear from the settlement.

14           You know, this is something that has been a source of  
15 confusion for tribes across the country. I've had discussions  
16 with them in addition to, obviously, my representation of  
17 Prairie Island in this matter. It is a concern, and it is  
18 something that should be addressed. You know, tribe --  
19 there's -- you know, if the settlement needs to be modified to  
20 account for the interests of tribes, that would be one way to  
21 go; but at the very least, we need some clarification on where  
22 they stand.

23           THE COURT: All right. Why don't we get that  
24 clarification from -- start with -- Mr. Burns, would that be  
25 your category?

1 MR. HUME: Your Honor, I think I was going to address  
2 this for subscribers, if I may. Sorry.

3 THE COURT: You may. Sorry. I heard a voice coming  
4 from somewhere.

5 MR. HUME: Coming at you from all angles, Judge  
6 Proctor.

7 This is Hamish Hume from Boies Schiller. And I was  
8 going to briefly address -- is it possible for the courtroom --

9 THE COURT: Can you hear him all right, sir?

10 MR. NICHOLS: Yes, I can.

11 THE COURT: All right. Thank you, Mr. Nichols.

12 MR. HUME: Is it possible for the courtroom deputy to  
13 switch back on the screen share so I can show what's on the  
14 screen? We can see the definition.

15 Thank you. And I hope Mr. Nichols can see that. I'm  
16 not sure, Your Honor --

17 MR. NICHOLS: I can.

18 MR. HUME: -- if it's large enough for you to see.

19 But here's the basic -- and I think there have been  
20 efforts to communicate with Mr. Nichols or his colleagues  
21 representing Prairie Island on this. We do not think there's  
22 anything unclear in the definition of "government account," Your  
23 Honor. The first thing that is very clear and not unusual is  
24 the first sentence of paragraph 1.hh. "Government account" is  
25 excluded from the definition of "insured groups."

1           Then the question becomes what's a government account.  
2 And it's defined in paragraph 1.hh. And the first sentence is  
3 very clear. "Government account" means only a state, a county,  
4 a municipality, an unincorporated association performing  
5 municipal functions, a Native American tribe. The tribe itself  
6 is a government account and excluded. Or the federal  
7 government --

8           THE COURT: Are you telling me that Blue Cross Blue  
9 Shield categorizes, for example, the Prairie Island account as a  
10 government account?

11           MR. HUME: I think that is correct.

12           THE COURT: Can someone from the Blues confirm or deny  
13 that?

14           MR. HOLMSTEAD: That's right, Your Honor. The Blue  
15 Cross Blue Shield plan characterizes Prairie Island as a  
16 government -- as a Native American tribe and, hence, a  
17 government account.

18           THE COURT: And are all the Native American ASOs  
19 categorized as government accounts?

20           MR. HOLMSTEAD: Well, certainly Prairie Island is one  
21 of the 574 federally recognized tribes. And so they certainly  
22 would fit that qualification, as would the other 573.

23           THE COURT: All right.

24           MR. HUME: So, Your Honor -- and it's not unusual to  
25 exclude government accounts and government entities from class

1 actions. Mr. Nichols was wondering why that is. They're  
2 obviously well equipped to represent their own interests. They  
3 are sovereign entities, state AGs, federal government, and  
4 Native American tribes as well. And so I don't know that  
5 there's a huge burden to justify that, but I think it is  
6 eminently justifiable.

7 Now, Mr. Nichols has referenced other related entities,  
8 like a casino or casino employee, you know, preferred  
9 provider --

10 THE COURT: It's my understanding those would not be  
11 government accounts.

12 MR. HUME: Exactly, Your Honor, with one proviso that  
13 he and his client will be far better situated to understand and  
14 interpret based on their individual circumstances.

15 The next sentence of the definition says no other  
16 entity other than the tribe itself -- no other entity that is  
17 not one of these things, including the tribe, is a government  
18 account unless it is required by law to provide any health care  
19 coverage it makes available to members only under, or as a  
20 participant in, a commercial health benefit product approved,  
21 selected, procured, sponsored, or purchased by that government  
22 account.

23 So in other words, if the Prairie Island tribe says,  
24 we're going to have casinos, we're going to set up a subsidiary  
25 that does this, a subsidiary that does that, we're going to have

1 lots of different enterprises, they could do one of two things.  
2 They can say you guys go and figure out your insurance situation  
3 for your employees on your own, or they could say all of us are  
4 going to band together and we're going to buy health insurance  
5 that we're going to negotiate up here at the top as a tribe or  
6 that we're going to require all of us to negotiate together.

7           And that's the one play in the joints here that we  
8 negotiated with the Blues to ensure that government-like  
9 entities are treated like the government and that if they are  
10 not, if they're truly operating on their own and only  
11 quasi-governmental and purchasing insurance on their own, not  
12 under the mandate of a government entity, then they are  
13 participants in the class and would have gotten notice and could  
14 submit a claim.

15           So it should be clear. I think, in fact -- you know,  
16 we regret that there's confusion by Prairie Island and  
17 Mr. Nichols, and we're happy to talk more with him, but I think  
18 the fact that there's only one such objector suggests that  
19 it's --

20           THE COURT: All right. Mr. Nichols.

21           MR. NICHOLS: Well, Your Honor -- this is -- thank you,  
22 Your Honor.

23           You know, this is very much like other conversations  
24 I've had where we go in circles and it seems like no one is  
25 willing to actually listen to the concerns of the tribes. So

1 here -- here -- so number one, I just want to reiterate that  
2 there is no good reason to separate the tribes from the other --  
3 other plans. I mean --

4 THE COURT: Well --

5 MR. NICHOLS: -- they were priced and marketed through  
6 the same.

7 THE COURT: Well, let me ask you this. If the  
8 intention of counsel was to exclude governmental accounts as a  
9 category and you are categorized as a governmental account, then  
10 I don't understand what the confusion would be. And I don't  
11 understand anything other than your potential argument that they  
12 shouldn't have done that.

13 MR. NICHOLS: Okay. Well, as it relates to the  
14 self-insured plan for tribal members, Your Honor, I have little  
15 disagreement with what you said. I don't think it was a fair  
16 decision to exclude government accounts -- to include tribes as  
17 government accounts. My client disagrees with that decision.  
18 But I can at least understand the logic of saying that a  
19 self-insured plan for tribal members is a government account. I  
20 disagree with the logic, but I understand it. You're -- I don't  
21 disagree with you there, Your Honor. But --

22 THE COURT: But doesn't it matter here what the  
23 Blues -- how you're categorized within the Blue system? So --

24 MR. NICHOLS: Well, I -- it potentially could. I mean,  
25 if there was some substantive difference about how the Blues



1 priced or marketed the plans, I would certainly recognize that  
2 as a legitimate basis for the exclusion. But if tribes and, you  
3 know -- if self-insured plans operated by tribes are priced to,  
4 marketed, in the same way as any other commercial employer, I  
5 mean, it -- the logic doesn't line up. It makes no sense.  
6 There's just no basis for the exclusion.

7 But I also just want to home in on one other point too  
8 that's related to this. I mean, we --

9 THE COURT: Well, and Mr. Nichols --

10 MR. NICHOLS: Oh, okay.

11 THE COURT: Mr. Nichols, I think what they said was  
12 that government plans usually are uniquely equipped to assert  
13 their own claims and have lawyers like yourself. And that's one  
14 of the -- that's the basis that I've heard articulated today in  
15 the courtroom. Now, it rings --

16 MR. NICHOLS: Well, that could apply to any class  
17 member.

18 THE COURT: No. General -- not every plan has a lawyer  
19 and not every plan is uniquely categorized by the Blues as a  
20 governmental account. That's why I asked the Blues if they  
21 could confirm that.

22 So I'm glad to hear you out. One more shot to explain  
23 exactly how -- one, why you have any rights under an agreement  
24 that excludes you and, second, how you're prejudiced in any  
25 event. Because it seems to me the only thing you can't do under

1 this agreement that you could do if you were under the agreement  
2 is either opt out, which if you did that, it would be easy, or  
3 you cannot make a claim under the agreement for any type of  
4 (b)(3) damages. Having said -- and you would not necessarily be  
5 included on a second Blue bid. I don't know if you're large  
6 enough and geographically dispersed enough for that to even be  
7 an issue.

8 But what this means is that you're -- you get the  
9 benefit of the (b)(2) relief that everybody who does business  
10 with the Blues is going to get, it seems to me, and then the  
11 second thing is you can pursue your claims independent of this  
12 class action if your client chooses to do. Am I wrong on any of  
13 those points?

14 MR. NICHOLS: Yes. Well -- you are not wrong. I will  
15 make one last point relating to the self-insured plan for tribal  
16 members, and then I want to make a point relating to the  
17 self-insured plan for the casino employees.

18 With respect to the self-insured plan for members, you  
19 know, excluding tribes on the same basis that state governments  
20 are excluded, I think, is -- doesn't add up because, you know,  
21 Prairie Island is fortunate in the sense that it has resources  
22 to hire attorneys and to look at all of these issues. But there  
23 are many tribes that are smaller or do not have the same  
24 resources. And to deprive them of even the opportunity of  
25 benefiting from this class action that is supposed to have

1 been -- to address these anticompetitive injuries that they have  
2 suffered just like anybody else just seems profoundly unfair to  
3 me. And that's part of why Prairie Island did, you know, seek  
4 to present this objection on behalf of all tribes.

5 THE COURT: You're objecting on behalf of Prairie  
6 Island, and you've made an objection today on behalf of Prairie  
7 Island, not 573 other tribes, have you?

8 MR. NICHOLS: Well, we don't -- only as -- only  
9 representing the tribal interests here. I don't know of any  
10 other tribe that has stepped forward. And so I mean, we did,  
11 you know, mention that in our objection, that we feel like this  
12 is something that does apply beyond Prairie Island. And I  
13 will -- I understand your position on this, Your Honor, and I  
14 will -- that's all I'll say on the self-insured plan as it  
15 relates to tribal members.

16 I think that the casino self-insured plans do raise an  
17 issue that does need to be addressed still and has not been  
18 addressed yet. So I think that the Blues and the class counsel  
19 are operating under an assumption that there is a clear line  
20 between a tribe and its businesses. And, you know, that is  
21 often not the case, and it's certainly not the case for Prairie  
22 Island's casino.

23 The casino operates as an arm of the tribe. It is a  
24 part of the government whose function is to raise revenue for  
25 governmental services. So it's not, you know, Prairie Island

1 Casino, Incorporated. It is Prairie Island Casino, an  
2 enterprise of the tribe.

3 Now, I think it is exceedingly unclear how that plays  
4 out under the current class definition.

5 THE COURT: Let me just ask you this. Why wouldn't you  
6 just go ahead and file a claim?

7 MR. NICHOLS: Right.

8 THE COURT: If the settlement administrator approves  
9 the claim, then problem solved. If the claim gets denied, there  
10 is a process for you to contest the denial of the claim; right?

11 MR. NICHOLS: We certainly plan to avail ourselves of  
12 that, but objecting is also a way to avail -- is also something  
13 that's open to us. And part of why we wanted to take this path  
14 is because we do want clarity so that this can be communicated  
15 to other tribes. I mean, we are not the only one in this  
16 situation. This business structure is not unique. And, you  
17 know, like I said, I mean, I'm -- I represent Prairie Island on  
18 this, but our motivation for the objection is that we have  
19 interests that are not unique.

20 THE COURT: Well --

21 MR. NICHOLS: And I think that something that would be  
22 very helpful here -- I mean, class counsel and the Blues have  
23 had our objection for months. The objection identifies each of  
24 the three self-insured plans that Prairie Island operates. They  
25 always want to say, oh, the self-insured plan for members is a

1 government account, but I have not heard anything addressing the  
2 Treasure Island plans, the casino plans for members. I mean,  
3 there's two of those plans.

4 THE COURT: Well, again --

5 MR. NICHOLS: Can we get that clarity?

6 THE COURT: Do we have any clarity on that?

7 MR. HOGAN: Your Honor, Des Hogan. Prairie Island  
8 Indian Community, doing business as Treasure Island Resorts and  
9 Casinos, is included in the class and should have received  
10 notice and they should file a claim if they have one.

11 THE COURT: Apparently they did.

12 MR. NICHOLS: Well --

13 THE COURT: So you're in the class. You can assert  
14 your claim on behalf of the casino business, if I can  
15 generically refer to it that way.

16 But having said that, you know, you might have heard  
17 Mr. Hausfeld say yesterday that objections in this case are  
18 literally one in a million. Well, your objection on behalf of  
19 tribes is one in 574. None of the others are here. I'm not  
20 going to entertain any objection based upon that because I don't  
21 think you have -- I don't think you can represent them. Maybe  
22 you can. Maybe you've been authorized, retained, hired. But  
23 the point is is they're all excluded based upon the definition  
24 of a government account. Same clarity applies to them as you.  
25 And it sounds like now, with respect to your secondary concern,

1 you may be in business. At least, that's what I just heard.

2 MR. NICHOLS: Well, you know, considering that we filed  
3 this objection in July and I've been, you know, pestering  
4 these --

5 THE COURT: Well --

6 MR. NICHOLS: -- everyone for an answer on these --

7 THE COURT: -- Mr. Nichols. Mr. Nichols.

8 MR. NICHOLS: Yes.

9 THE COURT: You understand you filed an objection with  
10 the Court.

11 MR. NICHOLS: Yes, I do.

12 THE COURT: You're not objecting to the other parties.  
13 You're objecting to the Court on the -- so this is the date in  
14 which your objection has been heard.

15 MR. NICHOLS: Right.

16 THE COURT: And I am overruling your objection to not  
17 being included as a government account, and I am declaring as  
18 moot your secondary objection that your -- that the casino  
19 business should not be excluded because I've just been informed  
20 that they are included. You can assert the claim.

21 And we'll now move on to GM.

22 MR. NICHOLS: Your Honor, may I -- may I -- I'm sorry.  
23 I just want to make one final point, one final request here.

24 I know that you're skeptical of our capacity to  
25 represent other tribes, but I do want to say that there is an

1 intense amount of confusion about what tribal plans can  
2 participate. And I really am afraid that there are tribal plans  
3 out there, you know, similar plans for tribal enterprises that  
4 have self-insured plans for employees, that think they are  
5 excluded because of how the "government account" definition was  
6 set up. And it would really be an injustice if, you know, that  
7 lack of clarity in the definition caused those tribes to lose  
8 their rights. And that's part of why we're here today, and  
9 that's all I will say on the matter.

10 THE COURT: Well, they had every opportunity to do  
11 exactly what you've done in this case, to object.

12 MR. NICHOLS: That's right, Your Honor. And --

13 THE COURT: And they have every opportunity to do what  
14 I've told you that you should do in this case, file a claim. I  
15 don't know what else to say.

16 MR. NICHOLS: Well, I will take -- I will spread that  
17 message to Indian country, Your Honor.

18 THE COURT: Take the good news to the people.

19 MR. NICHOLS: Well, in these short two weeks, I will do  
20 that.

21 THE COURT: Thank you.

22 MR. NICHOLS: Thank you.

23 THE COURT: All right. We'll now hear from General  
24 Motors.

25 Thank you, Mr. Nichols.

1 MR. NICHOLS: Thank you, Your Honor.

2 MR. WANCJER: Thank you, Your Honor.

3 THE COURT: I know you're not a governmental account.

4 MR. WANCJER: That is correct. My name is Hershel  
5 Wancjer. I represent General Motors. And we previously  
6 submitted an objection in connection with our inability to  
7 solicit a second Blue bid. I simply wanted to note on the  
8 record that we join the national account objectors in the  
9 arguments they have made during the fairness hearing and in  
10 their papers concerning the provision of the second Blue bid for  
11 injunctive relief.

12 THE COURT: Is your objection in any way  
13 indistinguishable from what I've already heard about the second  
14 Blue bid objection?

15 MR. WANCJER: Yes. That's why I have nothing to add to  
16 the discussion. I just wanted to note it on the record.

17 THE COURT: All right. You just want to make sure  
18 you've not waived it.

19 MR. WANCJER: That's right.

20 THE COURT: You have not.

21 MR. WANCJER: Thank you, Your Honor.

22 THE COURT: Thank you.

23 All right. I think next is Tenneco.

24 MR. TEDROWE: Good afternoon, Judge Proctor.

25 I just want to thank you for letting me participate by



1 Zoom today in getting my objection on behalf of Tenneco on the  
2 record. I know you and probably everyone else in the courtroom  
3 is exhausted right now, and so I'll keep this succinct and to  
4 the point.

5 The objection that Tenneco is lodging has to do with  
6 the second Blue bid, but it is an objection not to the concept  
7 of the second Blue bid, but to the procedural mechanism through  
8 which it's determined.

9 Tenneco is an automotive manufacturer of parts  
10 nationwide. And in the last several years, it's acquired a  
11 company called Federal-Mogul, took over its self-funded plan,  
12 and also formed its wholly-owned subsidiary called DRiV. That's  
13 going to be relevant to the objection, and you'll see why I  
14 mentioned that in a second.

15 As you know, a second Blue bid is not provided to all  
16 ASOs but only to some that satisfy a couple criteria largely  
17 based on data from Dun & Bradstreet. They have to have at least  
18 5,000 U.S. employees, and they have to have a high enough  
19 dispersion percentage to make it onto the list. And my  
20 information is that the dispersion percentage -- the cutoff to  
21 make the list was roughly 67 percent. So if you had a 67  
22 percent or higher dispersion percentage, you made the list.

23 Tenneco, using its own data and including Federal-Mogul  
24 and DRiV, its recent acquisitions, has a dispersion percentage,  
25 roughly, of 90 percent. That's using its own data. However, it

1 did not make the list that's attached to the proposed settlement  
2 agreement as Appendix C. And it's our belief -- and I think  
3 it's a justified belief -- that it is not because the folks  
4 calculating the dispersion percentage can't do math, it's  
5 because the numbers that they received from Dun & Bradstreet  
6 were erroneous. We believe it has to do with something --

7 THE COURT: Or out of date.

8 MR. TEDROWE: Or out of -- exactly, Your Honor.  
9 There's something having to do with the corporate structure and  
10 these acquisitions that did not make it into the data.

11 THE COURT: All right. What would be objectionable,  
12 though, to the parties agreeing that, you know, when it comes to  
13 ASOs and who's eligible based upon the fact that they're an  
14 employer -- I think there's three requirements; maybe I'm  
15 wrong -- but they have to be an employer, they have to have at  
16 least 5,000 employees -- and these are eligibility, not  
17 necessarily where the line gets drawn -- and then the geographic  
18 dispersion requirement has to be met. Anybody disagree with the  
19 three-element test here?

20 MR. BOIES: No.

21 MR. BURNS: No, Your Honor.

22 THE COURT: All right. So what's wrong, though, with  
23 the parties saying, you know, when it comes to determining  
24 geographic dispersion, we're going to use an objective benchmark  
25 of Dun & Bradstreet, which is not always accurate, but a pretty

1 handy business tool. And you're in a unique situation in that  
2 through acquisitions, you have maybe increased your geographic  
3 dispersion just recently; right?

4 MR. TEDROWE: In the last three or four years.

5 THE COURT: Okay. And when are the most recent Dun &  
6 Bradstreet figures? How old are those that you say don't  
7 account for your recent acquisitions?

8 MR. TEDROWE: Well, we were not provided, actually,  
9 with the data that the Blues used to calculate it. We requested  
10 it in the mediation process but did not receive it. So I can't  
11 really say for certain. But we do believe it's out of date,  
12 regardless of when the last time D&B updated their data.

13 THE COURT: All right. So let me call a time-out,  
14 Mr. Tedrowe, and ask counsel for the subscribers.

15 What do we do with outdated Dun & Bradstreet data, if  
16 anything?

17 MS. BOJEDLA: Sure. I have had several conversations  
18 with Mr. Tedrowe and his colleagues about this issue, and we did  
19 actually provide them with the data that Dun & Bradstreet has  
20 for Tenneco. And what that data shows is that there are 36,000  
21 out of 53,000 of their employees located in Illinois and, in  
22 total, about -- they have a dispersion percentage of about 27  
23 percent outside of their ESA based on the Dun & Bradstreet data.

24 THE COURT: What year was the Dun & Bradstreet data?  
25 Do you have that at your fingertips?

1 MS. BOJEDLA: That, I don't have at my fingertips. And  
2 I'm not sure if my colleagues --

3 MR. HOLMSTEAD: Settlement date.

4 MS. BOJEDLA: Excuse me?

5 MR. HOLMSTEAD: When the settlement was executed.

6 MS. BOJEDLA: When the settlement was executed.

7 THE COURT: Okay. Is that the date the parties decided  
8 to use as the fixed point?

9 MS. BOJEDLA: Yes. So the settlement, as written, says  
10 that the Appendix C reflects the first list of qualified  
11 national accounts, and that list will be refreshed every two  
12 years after the effective date.

13 THE COURT: So in two years, they may be eligible for a  
14 second bid, but not now, is what your position would be.

15 MS. BOJEDLA: Correct.

16 THE COURT: And, Mr. Tedrowe, of course, you want one  
17 now.

18 MR. TEDROWE: Tenneco certainly would like the  
19 opportunity to work with D&B to correct the data and resubmit  
20 it. Absolutely.

21 THE COURT: Even if you did that, if the parties  
22 agreed -- you know, we have to know before the Blues agree to a  
23 settlement. The Blues need to know what they're dealing with in  
24 terms of who gets a second bid and who doesn't. Because they're  
25 going to take that back to their client, and their client is

1 going to make decisions about whether they're willing to enter  
2 into a settlement with that. Their position all along, as you  
3 know, is no one should get a second bid, we've got a great  
4 system in place.

5 MR. TEDROWE: Yes.

6 THE COURT: And the position of the subscriber class  
7 was, oh, no, no, no -- or actually, the ASO class -- no, no, no,  
8 many people ought to get a second bid. In fact, we might even  
9 have contended during the litigation that people ought to get  
10 more than two bids. But the parties negotiated a resolution of  
11 their dispute and said as of this date, we're going to use Dun &  
12 Bradstreet.

13 Now, you may be right. Dun & Bradstreet's data may not  
14 have been up to date, but that's not the parties' fault if they  
15 agreed that was the default that would use. But the parties  
16 also built in room for your situation. And that is the data  
17 will refresh every two years and there will be an expanded or  
18 contracted or different list of who's eligible for a second bid  
19 when the data refreshes.

20 Okay. So explain to me -- I don't think that treats  
21 you inequitably compared to other class members because  
22 everybody is either in Dun & Bradstreet at that fixed point as  
23 being geographically dispersed or not based on the information  
24 Dun & Bradstreet has. Or I don't think it -- I can't say it's  
25 an unreasonable drawing of the line because no matter where the

1 line got drawn, somebody was going to be in and out.

2 So explain to me the basis of your objection and what  
3 you think I ought to do about it.

4 MR. TEDROWE: Yes. So the basis of the objection is  
5 that -- it goes to a couple things. The problem isn't Dun &  
6 Bradstreet. The problem is not the date. The problem is that  
7 there's no mechanism for review of the D&B data that's going to  
8 be used before it's used. There's no mechanism for appealing it  
9 on the grounds that the data that was used was inaccurate. And  
10 so the only recourse is to wait two years, which is a recourse.  
11 But if -- what it really means, Your Honor, is that it goes to  
12 the competitive benefits that's supposed to accrue to class  
13 members because of the dispersion percentage.

14 We heard this morning -- there was a slide that said  
15 more disperse accounts are also more likely to actually attract  
16 a bid from a Blue plan outside of their home service area. If  
17 you have -- if you have a system in place for choosing the  
18 highest dispersion percentage employers, then the interest of  
19 the settlement has got to be to ensure that the data being used  
20 is accurate. And in this case -- and admittedly, I don't think  
21 there are many in this situation; I don't profess to know -- but  
22 in Tenneco's case, an error was clearly made, and it undermines  
23 the intent of increasing competition between Blues.

24 I would also argue --

25 THE COURT: No. I guess I would disagree with you

1 there because I think that your objection, if sustained, would  
2 undermine the intent of the parties. Because what that means is  
3 the Blues now have -- what if there are others in this category  
4 and what the parties negotiated in terms of the number of second  
5 Blue bids that have to be given -- what if it turns out that the  
6 geographic dispersion requirement drops the number of people  
7 eligible for a Blue bid? Well, then the subscribers have ended  
8 up with less than they negotiated for. What if that number  
9 increases just on the geographic dispersion criteria? Then  
10 you've got a wholly different people who are now at least  
11 eligible to be considered before we draw the line, I guess;  
12 right?

13           So it's not going to necessarily change the number of  
14 second Blue bids, but it's going to create a lot of confusion  
15 about who should be -- who's eligible and who should be  
16 considered for that line. And I think the parties -- the whole  
17 idea was the parties said, we don't want to have to deal with  
18 this. We're going to consult Dun & Bradstreet at the time of  
19 the settlement, we're going to see who is qualified, we're going  
20 to put them on a list, we're going to rank them in high-to-low  
21 order, and we're going to draw a certain line at 31 percent --

22           MS. BOJEDLA: 33 million covered lives.

23           THE COURT: -- or 33 million lives?

24           MS. BOJEDLA: 33 million covered lives.

25           THE COURT: Yes. And so the problem is if you're

1 right -- okay. Let's say you're right. Do you bump somebody  
2 off the list that -- if you're big enough to bump somebody off  
3 the list? Well, then that creates a lack of clarity for them.  
4 They're going to say, wait a minute, we should get a second Blue  
5 bid. Dun & Bradstreet doesn't even say Tenneco qualifies.

6 MR. TEDROWE: Well --

7 THE COURT: So I think that's the confusion the  
8 parties, I suspect, were trying to avoid. And so I'm going to  
9 overrule the objection, but I'm going to tell you that it sounds  
10 to me like you're going to be in great shape in two years.

11 MS. BOJEDLA: Thank you, Your Honor.

12 MR. TEDROWE: I certainly hope so, Your Honor. Thank  
13 you. I appreciate the time.

14 THE COURT: All right. Thank you. And I appreciate  
15 your succinctness too.

16 All right. Does anybody disagree with anything I've  
17 just said in terms of that ruling? This is your chance to  
18 speak.

19 MR. HOLMSTEAD: No, Your Honor.

20 MR. BURNS: No, Your Honor.

21 THE COURT: Did I capture correctly the parties'  
22 intentions in getting this list in the first place?

23 MR. HOLMSTEAD: Yes, you did, Your Honor.

24 THE COURT: Clarity?

25 MR. BURNS: You did, Your Honor.



1 THE COURT: And, Mr. Holmstead, you wanted to make sure  
2 your client knew exactly what it was signing up for if it signed  
3 onto this agreement?

4 MR. HOLMSTEAD: That's right, Your Honor.

5 THE COURT: All right. I think next is we're back to  
6 Mr. Behenna, who I gave some homework to this morning.

7 And, Mr. Whatley, I haven't forgotten y'all. I don't  
8 want you to think I have. But I thought in fairness, you ought  
9 to have the opportunity to hear all of the objections before I  
10 ask you about your position. Fair? I'll take your silence as  
11 acquiescence.

12 (Ms. Kallas waves)

13 MR. WHATLEY: Judge, you should take my silence as  
14 inability in working with Zoom.

15 THE COURT: Well, I'm going to come back to you. Fair?

16 MR. WHATLEY: Fair.

17 THE COURT: All right. Thank you.

18 All right. First, Mr. Behenna, I thank you for sitting  
19 through two days of this, because I know much of it did not deal  
20 with your objection. And you have been -- I think you might get  
21 the gold star for sitting through everybody else's arguments  
22 because I notice the courtroom is mysteriously less packed than  
23 it was even this morning, much less yesterday. So I'm going to  
24 commend you for that.

25 MR. BEHENNA: It's been quite an education.

1 THE COURT: I'm sure it has.

2 MR. BEHENNA: Can you hear me okay?

3 THE COURT: I may -- I can. Yes. Thank you.

4 MR. BEHENNA: So with regard to my homework assignment  
5 and why the common fund is not applicable here, I looked at a  
6 recent case from the Eleventh Circuit called *Home Depot Customer*  
7 *Data Security Breach*, and it --

8 THE COURT: Judge Thrash's settlement over in Atlanta  
9 on a multi-district case that I think I and others sent to him.

10 MR. BEHENNA: Okay. 2019.

11 THE COURT: I'm familiar with that case.

12 MR. BEHENNA: Okay. There are a couple things there.  
13 It goes into great --

14 THE COURT: As I recall, the Eleventh Circuit treated  
15 that as a constructive common fund.

16 MR. BEHENNA: Actually, I believe --

17 THE COURT: It's been a while since I read the  
18 decision, but I think that's right.

19 MR. BEHENNA: It was actually treated as a fee-shifting  
20 via contract.

21 THE COURT: Does anybody disagree with that? Maybe  
22 not. Okay. Go ahead.

23 MR. BEHENNA: Okay. So a couple of bullet points, and  
24 I might be paraphrasing a little bit and not quoting exactly as  
25 it was in the opinion. The first point is that in the decision,

1 they found that a common fund is -- can be a situation where a  
2 defendant negotiates a payment to the class and attorney fees as  
3 a package deal. And I would note here in the documentation and  
4 the papers filed with the court that the fees were negotiated  
5 separately from the consideration paid to the class. And I made  
6 the cite in my objection.

7 And they also made the point that the common fund does  
8 not apply when a group provides attorney's fees will be paid  
9 separately from the settlement fund. Now, on the face, it -- of  
10 the settlement agreement, it looked like that's the case, but a  
11 couple things are a little unusual here. First, the Court  
12 allowed a \$75 million quick fee to be paid last November as part  
13 of the preliminary approval. I think that's unusual, and I  
14 think Your Honor made that comment or said that comment was made  
15 in the motion papers.

16 And the point I tried to make in my paper -- in my  
17 objection was that that \$75 million that was approved being paid  
18 to plaintiffs' counsel was paid before the class -- the classes  
19 received any benefits, it was paid before any fee application  
20 was made to the Court, and it was paid before the settlement  
21 agreement has been approved, which it hasn't. We are here for  
22 that now.

23 THE COURT: It was actually a quick-pay provision, but  
24 yes.

25 MR. BEHENNA: I've never -- okay. Quick -- okay.

1 Quick-pay. I've never -- a very unique thing. So that -- those  
2 monies went directly from the defendants to plaintiffs' counsel.

3 The second thing is I noticed in the papers --

4 THE COURT: Let me ask you this. Are you contesting  
5 that? Are you objecting to that?

6 MR. BEHENNA: No, no. I'm trying to respond to my  
7 homework assignment, which is --

8 THE COURT: Okay. I'm just making sure I understood  
9 the context of your remark.

10 MR. BEHENNA: Gotcha. And the second thing in the  
11 papers, which there was no -- I could not find it, and it may be  
12 my oversight. \$300 million was also approved to be moved into  
13 an escrow account. And in the papers, I couldn't find any  
14 reason why that \$300 million was moved. And perhaps it was in  
15 the transcripts in the hearing, but I did not review those  
16 transcripts. And it's -- maybe it's a coincidence -- but I  
17 don't believe in coincidences -- that on the math, when you add  
18 the lodestar, the fees, and the 75 million, you get about \$300  
19 million.

20 So one of the questions is why was \$300 million moved  
21 into an escrow account as part of the preliminary approval.

22 THE COURT: But in Home Depot, the parties specifically  
23 did not negotiate a fee arrangement and left it to the district  
24 court to decide. Right?

25 MR. BEHENNA: I --

1 THE COURT: That's why it wasn't a constructive common  
2 fund. It was left to the district court to award a fee.

3 MR. BEHENNA: Right.

4 THE COURT: They -- I think what happened was they  
5 negotiated a settlement, could not agree on a fee, and said,  
6 punt, we'll let the district court decide it. Am I remembering  
7 this correctly?

8 MR. BEHENNA: Right.

9 THE COURT: Okay.

10 MR. BEHENNA: That's correct.

11 THE COURT: And the district -- and then Home Depot  
12 said, it's got to be lodestar. Plaintiffs' counsel said, it can  
13 be lodestar or a percentage, either way. And I think what the  
14 Eleventh Circuit said was it wasn't a percentage because it  
15 wasn't taken -- it's not being taken out of the settlement fund.  
16 There's a fund created, and it may be called a common fund, but  
17 there was no agreement that the fee come out of the fund. So --

18 MR. BEHENNA: The point I'm making, Your Honor, is this  
19 \$300 million is important because there's no explanation why  
20 \$300 million was paid from the defendants into the escrow fund  
21 here. And what I'm saying is that given the math --

22 THE COURT: You're going to have to explain that to me.  
23 I didn't -- I'm not following what you're saying.

24 MR. BEHENNA: Okay. As part of the preliminary  
25 approval, two things were approved. \$75 million was paid from

1 the defendants -- I guess it maybe went through an escrow  
2 account, went to plaintiffs' counsel.

3 THE COURT: That's the quick-pay.

4 MR. BEHENNA: That's the quick-pay. So we already have  
5 established --

6 THE COURT: And you realize that gets -- if there's no  
7 settlement, what happens to that?

8 MR. BEHENNA: Well, I think there was an irrevocable  
9 letter of credit attached. I think it comes -- it comes back.

10 THE COURT: Yes.

11 MR. BEHENNA: But the question is it's already gone  
12 out. So --

13 THE COURT: Okay. That's just the quick-pay.

14 MR. BEHENNA: That's a credit --

15 THE COURT: You said you're not objecting to that.

16 MR. BEHENNA: I'm not objecting to it. I'm just trying  
17 to build the basis here for why this is not a common fund --

18 THE COURT: Okay.

19 MR. BEHENNA: -- and why there is evidence here that  
20 defendants have already paid or put into a payment situation the  
21 combination of the lodestar, the fees and expenses of about \$40  
22 million, which I'm not objecting to, plus the \$75 million. And  
23 as I said before -- and perhaps plaintiffs' counsel are here and  
24 they can explain it. Why was \$300 million approved to be moved  
25 a year ago before there was a fee application, before there were

1 any benefits received by the class, and before the settlement  
2 agreement was approved? Why does \$300 million go from the  
3 defendants to an escrow account?

4 THE COURT: All right.

5 MR. BEHENNA: Okay. And the only second point I wanted  
6 to make -- so to me, it's based on payment. Follow the dollars.  
7 Follow the dollar. Follow the cash.

8 My second point is it has to do with the fact that the  
9 consideration paid to the class -- excuse me -- as everyone  
10 knows, the claims are brought pursuant to the Sherman and  
11 Clayton Acts. And as I said, a little bit of a repetition,  
12 those acts include a fee-shifting provision.

13 And based on the settlement, there is a partial --  
14 prevailing on partial success because the class, if you approve  
15 the settlement, will get \$2.7 billion plus the injunctive  
16 benefits. So the other side of the coin of not being a common  
17 fund is I believe this meets the merits of a lodestar case based  
18 on prevailing and getting consideration for release of the  
19 claims. And that's it.

20 THE COURT: All right. Thank you.

21 MR. BEHENNA: Thank you very much, Your Honor.

22 THE COURT: Stand by, because you might want to reply  
23 to what the parties to the settlement agree -- argue about how  
24 this is characterized.

25 MR. BOIES: Your Honor, I think I can clear up the

1 issue about the \$300 million quickly. At the time that we  
2 negotiated, the plaintiffs' view was that when we signed the  
3 settlement agreement, the defendants ought to put the entire  
4 amount of the settlement in escrow. They didn't want to put  
5 anything in escrow until the final approval hearing. And there  
6 was a recommendation from the special master that we compromise  
7 at \$300 million, so that's what we did. We obviously wanted as  
8 much put in as possible because once it gets into escrow, if we  
9 succeed in implementing the settlement --

10 THE COURT: You might get some interest on that.

11 MR. BOIES: -- we get the interest on it.

12 THE COURT: Yes. That's -- who gets the benefit, the  
13 time value benefit of the money if it's approved?

14 MR. BOIES: Well, if it's approved, we get the  
15 interest.

16 THE COURT: Right. That's what I'm saying. Who gets  
17 the time value of the money?

18 MR. BOIES: The Blues.

19 THE COURT: Yes.

20 MR. BOIES: The Blues, which is why we wanted as much  
21 as we could get. They wanted as little.

22 THE COURT: No. Who gets the time value of the money  
23 put in the escrow? Who gets the -- who recovers the interest in  
24 the escrow if it's put into escrow?

25 MR. BOIES: We do. We do.



1 THE COURT: So with respect to that 300 million, you  
2 get the time value of the money --

3 MR. BOIES: Exactly.

4 THE COURT: -- if it's approved.

5 MR. BOIES: If it's approved.

6 THE COURT: And they get the time value of the money --  
7 the balance of the resolution if it's approved.

8 MR. BOIES: Right.

9 THE COURT: They get to hold on to their money a little  
10 longer.

11 MR. BOIES: Exactly.

12 THE COURT: Okay. So it's a negotiated division of --

13 MR. BOIES: It was a negotiated compromise. And it  
14 didn't have anything to do with lodestar or anything like that.

15 The quick-pay provision is just a normal quick-pay  
16 provision. Again, it --

17 THE COURT: Y'all expended 40 million of your own  
18 money, thereabouts?

19 MR. BOIES: Right. Right.

20 THE COURT: And this was an opportunity to -- and not  
21 to mention your billed time not collected at this point?

22 MR. BOIES: Yeah. Exactly.

23 THE COURT: It's not a lodestar agreement, but you're  
24 still out the time value of your -- the money value of your  
25 time, I guess is the way I'd put it.

1 MR. BOIES: Or the time value of the expenses we put  
2 in.

3 THE COURT: Exactly.

4 MR. BOIES: And again, you have quick-pays sometimes in  
5 common fund --

6 THE COURT: No one has challenged the quick-pay --

7 MR. BOIES: Right.

8 THE COURT: -- provision that I've noticed. You know,  
9 I did give that -- as you know, I gave that a hard look --

10 MR. BOIES: You did.

11 THE COURT: -- last year on preliminary approval  
12 because I hadn't had that come up before.

13 MR. BOIES: Right.

14 THE COURT: It turns out I think in big cases, some  
15 courts consider that and approve it. I plumbed the well, didn't  
16 have an issue with it after I'd plumbed the well.

17 MR. BOIES: Right.

18 THE COURT: But I didn't just pass -- let you pass go  
19 and collect your \$75 million.

20 MR. BOIES: Right. And as the Court said, there's an  
21 irrevocable letter of credit to make sure that the money comes  
22 back if the settlement is not approved.

23 With respect to the basic issue, *Home Depot*, as the  
24 Court correctly says, was a situation in which the fee did not  
25 come out of the common fund. It was a fee that was awarded by

1 the court over and above what the common fund provided. And  
2 the Eleventh Circuit, in its wisdom, decided that that meant  
3 that you were limited to lodestar.

4 Now, that has nothing to do with the situation where  
5 the money comes out of a common fund. This is just a typical  
6 common fund case. We've got a common fund on the -- the amount  
7 of the fee that comes out of the common fund will be awarded by  
8 the Court. And all we did was negotiate with the defendants as  
9 to what the maximum amount of that fee would be.

10 THE COURT: All right.

11 MR. BOIES: Thank you.

12 THE COURT: So what's your -- I told you I'd give you a  
13 chance to respond. What's your response to all that?

14 MR. BEHENNA: Well, my response goes back to \$75  
15 million still was paid. I understand there's a letter of credit  
16 backing it, but it still was paid from the defendants. Even  
17 though it's, you know, not the full lodestar, it's still a  
18 significant amount of money. And I still say -- I understand  
19 counsel's -- I listened to counsel's explanation, but the papers  
20 don't explain why \$300 million was put in escrow. So --

21 THE COURT: I think he just explained that there's --  
22 the class, not counsel but the class, benefits if -- and it may  
23 be counsel ultimately because of the common fund claim to 25  
24 percent. But everyone on Mr. Boies' side of the case benefits  
25 if they can make a return on the money that is agreed to be paid

1 from the time there's an agreement until the time it's actually  
2 paid. The Blues were not going to put all that money in escrow.  
3 And I think it was -- was it not just a negotiated amount that  
4 went into escrow so that there would be some return on the  
5 subscriber and ASO side of the case for that money not getting  
6 into anyone's pockets early? Maybe I'm oversimplifying it,  
7 but --

8 MR. BOIES: No, no. You're exactly right, Your Honor.  
9 It was entirely designed to give us -- the class -- not us, the  
10 class --

11 THE COURT: Right. Well, and -- but, you know, it  
12 benefits the class because you get 25 percent.

13 MR. BOIES: Right.

14 THE COURT: I guess that's actually right. It does  
15 benefit the class. It's just extra interest earned on 300  
16 million. Now, if you could have got them to put 2.67 billion  
17 into escrow --

18 MR. BOIES: We would have done it.

19 THE COURT: -- you would have been happy with that,  
20 wouldn't you?

21 MR. BOIES: We would have been, Your Honor.

22 THE COURT: You know, a billion here, a billion there,  
23 pretty soon you're talking real money.

24 MR. BOIES: Even at low interest rates.

25 THE COURT: Yes. Okay.

1 MR. BEHENNA: So my only comment, Your Honor, is I  
2 understand that the defendants weren't going to put 2.7 billion  
3 in, and I understand that. But there's really no explanation  
4 underlying the math underlying the \$300 million. So --

5 THE COURT: That was just negotiated is the  
6 explanation. That was the amount that -- that was the amount  
7 that, pardon the pun, the subscribers could pry out of the  
8 Blues' cold, steel hands.

9 MR. BEHENNA: And the last comment I make on that is  
10 the -- I looked for the draft escrow agreement in the documents.  
11 I could not see it. I did note that two or three members on --  
12 that are going to control the escrow provisions are plaintiffs'  
13 counsel. I believe the third may be from the defendants. I  
14 don't know.

15 So I think in terms of also understanding it was just a  
16 negotiated number kind of thing is understanding the release  
17 provisions and the timing of when that \$300 million might be  
18 released to plaintiffs' counsel as opposed to the balance being  
19 released to the class, I guess (b) (3) you've been calling it,  
20 and also the proposed fee enhancements of over \$400 million. So  
21 I think that escrow agreement, you know, is not available at  
22 this time, but that also may have some -- some issues of --  
23 language of concern in it. So...

24 THE COURT: Are you objecting to it?

25 MR. BEHENNA: No, I'm --

1 THE COURT: I'm here to deal with objections, not  
2 theoretical concerns.

3 MR. BEHENNA: No, no. I'm dealing with my homework  
4 assignment --

5 THE COURT: All right.

6 MR. BEHENNA: -- which is how the terms of an escrow  
7 agreement can affect whether or not someone is really being paid  
8 from a fund or was being paid separately.

9 THE COURT: Why would that in any way move these -- a  
10 fee claim out of a below-the-line 23 point something percent of  
11 the fund, common fund, into the Sherman Act's fee-shifting  
12 provisions? How --

13 MR. BEHENNA: I'm sorry. Can you repeat that?

14 THE COURT: Yes. So what the parties to the settlement  
15 tell me is they are not riding on any fee recovery based upon  
16 the Sherman Act's fee-shifting provisions. I thought yesterday  
17 you were saying this should be a fee-shifting -- statutory  
18 fee-shifting case.

19 MR. BEHENNA: I still feel that way. I haven't  
20 changed.

21 THE COURT: All right. And that was certainly an  
22 option of the parties. They could have done like in *Home Depot*.  
23 They could have negotiated a fund for the class that the  
24 plaintiffs' counsel made no claim on and then just -- if it was  
25 structured this way, presumably, there could have been

1 litigation over a statutory fee that would be sent to the Court  
2 for resolution, for essentially a fees trial, bench trial.  
3 That's not what they chose to do, though. They chose to  
4 negotiate a common fund and allow -- and I think after that,  
5 plaintiffs' counsel are now making the claim based upon pretty  
6 well settled Eleventh Circuit case law that when you have a  
7 common fund for a group, counsel can make a claim against that  
8 fund for a benchmark. It's 20 to 30 percent, but the benchmark  
9 is generally 25 percent.

10 Is there anything else going on in this case other than  
11 that, Mr. Boies?

12 MR. BOIES: No, Your Honor.

13 THE COURT: Okay. So that was the parties' intention.  
14 I don't know that there's any case law that I can put my fingers  
15 on in the Eleventh Circuit or otherwise that would suggest that  
16 that's an inappropriate way to handle it.

17 Now, I do understand just the public view of class  
18 settlements and fees. But the -- you know, the public view  
19 doesn't always track with what the legal authorities are in this  
20 area. And we -- you know, I would be glad if I were at a  
21 symposium for you to explain to me why all the legal authority  
22 in this area is off the mark and the Eleventh Circuit should not  
23 permit this. I'm not on the Eleventh Circuit, so I have to  
24 follow what they say. If I was on the Eleventh Circuit, I'd  
25 have to follow what they said unless I could convince the

1 majority of my court to go along and overrule the precedent. So  
2 I think that's where we are.

3 MR. BEHENNA: Thank you for your time, Your Honor.

4 THE COURT: Thank you.

5 All right. Anything else before I go back to  
6 providers' counsel to see if they have any thoughts on this?  
7 I'm going to give y'all deadlines for your homework in just a  
8 moment, which I know Megan Jones and others are particularly  
9 interested in hearing what those might be.

10 So do -- Joe, appreciate you being available. I bet  
11 you've been attentively listening to everything and watching  
12 everything.

13 MR. WHATLEY: Yes, sir.

14 THE COURT: And my sense is that you are -- it's now  
15 confirmed that you made the right decision by staying there.

16 MR. WHATLEY: I believe so, Judge. My mother doesn't  
17 agree, but I believe so.

18 THE COURT: All right. So do the providers have any  
19 statement they wish to make about this settlement?

20 MR. WHATLEY: Judge, I think given the hour, unless you  
21 would prefer us to do something else, we'll just -- I gather  
22 you're going to have submissions after the fact. At some point,  
23 we're glad to submit anything that makes sense for us to send in  
24 rather than keeping everybody here.

25 THE COURT: All right. Well, this is your time to talk



1 to me, though. I mean, otherwise, you're just writing me a  
2 letter.

3 MR. WHATLEY: Well, Judge, I think the main thing is  
4 that the release carves our claims out of the settlement. I'm  
5 not complaining about it. It's -- we're glad it did. And so --

6 THE COURT: That means you can keep litigating.

7 MR. WHATLEY: It means we can keep litigating or we can  
8 try to resolve it.

9 THE COURT: Right.

10 MR. WHATLEY: And, you know --

11 THE COURT: Well, you know what? While we're on that  
12 subject, I have no problem with that.

13 MR. WHATLEY: We don't either, Your Honor. We  
14 appreciate that. I think you'll recall in slide 20, in fact, in  
15 the preliminary -- at the preliminary approval hearing that that  
16 issue of the exemption of loss was covered and Mr. Boies stated  
17 the providers are not parties to the settlement, they did not  
18 participate in the settlement, and our view is that this has no  
19 effect on their case. And of course, we agree. We agree  
20 wholeheartedly.

21 We're on record, Your Honor, about the effect of the  
22 relief in the providers' settlement -- I mean subscribers'  
23 settlement on providers; for example, docket number 2747 and  
24 docket number 2786-1. But since we're carved out of the  
25 settlement, we're not parties to it, we don't think today is the

1 time to talk about those issues.

2 And so that's I think everything we had to say today.  
3 I'm sure that probably I could be -- in the letter to you, maybe  
4 I could be a little more articulate and give you a little more  
5 information, but that's essentially all we have to say unless  
6 the Court has questions. And, of course, we're always glad to  
7 answer any questions the Court has.

8 THE COURT: Can anybody think of any counsel I should  
9 pose to provider counsel about the subscribers' settlement?

10 MR. BOIES: We can't.

11 MR. WHATLEY: I appreciate the invitation.

12 THE COURT: All right. And y'all are officially  
13 claiming Barry Ragsdale now; right?

14 MR. RAGSDALE: That's an unfair question.

15 MR. WHATLEY: Your Honor, we have been for some time,  
16 ever since your award appointing him.

17 THE COURT: He's sitting over here, so I think that was  
18 what he asked me to ask.

19 Okay. Anything else we need to take up?

20 Thank you, Joe and Edith. Appreciate y'all.

21 Anything else --

22 MR. WHATLEY: Yes, sir.

23 THE COURT: -- we need to take up from any other  
24 objector?

25 Anything we need to take up, subject to briefing, from

1 any objector or any proponent of the settlement?

2 MR. BOIES: Not from us at this time, Your Honor.

3 MR. LAYTIN: No, Your Honor. I know that you've talked  
4 about scheduling the Zoom hearing or conference with --

5 THE COURT: I'm going to coordinate with the special  
6 master about that.

7 MR. LAYTIN: But --

8 THE COURT: And that's the one thing we're going to  
9 leave open on this hearing is just doing the DOL issues that we  
10 need to address.

11 MR. LAYTIN: And what I want to clarify is there might  
12 be posthearing briefing; but that otherwise, the record is  
13 closed with respect to --

14 THE COURT: Any reason we shouldn't take the snapshot  
15 on the record that I should consider at this point? Take the  
16 team picture, as the saying goes?

17 MS. JONES: This concludes the fairness hearing for  
18 final approval.

19 THE COURT: For anything other than the Department of  
20 Labor's objection regarding ERISA plans. Okay. Fair enough.

21 Now, having said that, if something comes up, we'll  
22 have to address it; but at this point, unless something comes  
23 up, there's nothing else to address. All right? I just -- you  
24 know, I'm a neutral. I don't have any horse in this race, so  
25 I'm just -- I am hesitant to put down the never, ever, ever

1 language.

2 MS. JONES: Your Honor, for clarity for future class  
3 members -- I'm sorry. Megan Jones with Hausfeld.

4 For clarity for future class members, any hearing  
5 related to this hearing will be posted on the settlement  
6 website --

7 THE COURT: Yes.

8 MS. JONES: -- WWW dot BCBS settlement dot com.

9 THE COURT: And we'll make it available at least by  
10 telephone for those who want to listen in on that conference  
11 with the Department of Labor. You can't record it, as we've  
12 said before, although I realize why portions of this would make  
13 you think that if you could record it, it may help with some  
14 insomnia issues at night.

15 The deadline for the proponents to file any further  
16 written submissions in favor of the settlement is November 12.  
17 The deadline for any objectors or other interested persons to  
18 respond to the proponents' written submissions is December 1.  
19 And the deadline for any reply from the proponents or interested  
20 parties in the settlement responding to the objectors is  
21 December 10. I think that gives everyone time to get their  
22 thoughts in order.

23 Remember the advice that is usually attributable to  
24 Mark Twain but goes back, I think, to a Roman citizen centuries  
25 ago: You now have time to write a shorter letter.

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Okay? All right. Anything else?

MR. BOIES: No, Your Honor.

MR. ZOTT: No, Your Honor. Thank you.

THE COURT: All right. 5:45. We will call it a day.

COUNSEL IN UNISON: Thank you, Your Honor.

THE COURT: Thank you.

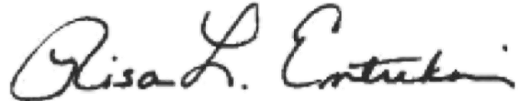
(Proceedings adjourned at 5:45 p.m.)

\* \* \* \* \*

COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

This 5th day of November, 2021.



Risa L. Entrekin  
Registered Diplomate Reporter  
Certified Realtime Reporter  
Official Court Reporter